No. 15662

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SYDELLE PRICE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-6-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

CHARLES K. RICE,
Asst. U. S. Attorney General;

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United States Attorney,
U. S. Courthouse,
Phoenix, Arizona,

Attorneys for Appellant.

McLANE AND McLANE,
806 Security Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the District of Arizona

No. Civil 2441

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SYDELLE PRICE,

Defendant.

COMPLAINT

Now comes the United States of America by Jack D. H. Hays, United States Attorney in and for the District of Arizona, and for claim against the above-named defendant alleges as follows:

I.

Plaintiff is a corporation sovereign and body politic.

II.

This action has been authorized by the Commissioner of Internal Revenue of the United States Treasury Department and is brought under the direction of the Attorney General of the United States.

III.

Defendant Sydelle Price resides at 130 W. Berridge Lane, Phoenix, Arizona, within the jurisdiction of this Court.

IV.

On or about October 10, 1949, the Commissioner of Internal Revenue assessed for the year 1946

an income tax deficiency in the sum of $9,965.48 plus interest thereon in the sum of $1,498.09 against defendant Sydelle Price. The tax assessment list was received by the Collector on or about October 14, 1949, and notice and demand were thereafter duly made. Notice of federal tax lien was filed in the office of the County Recorder of Maricopa County, Phoenix, Arizona, on August 19, 1953. A payment of $1,500.00 was made on said assessment on or about December 12, 1950. No other payments have been made on said assessment and there now remains due and owing the United States a balance of $9,963.57 on said assessment.

V.

An offer in compromise was filed on June 13, 1950, and withdrawn on July 30, 1951. A second offer in compromise was filed on August 20, 1953, and was rejected on December 14, 1953. As a result of the filing and pendency of these two offers in compromise the time in which the United States may file an action for the collection of said tax has been extended beyond the date of the filing of this action.

Wherefore, the plaintiff prays:

1. That this Court order, adjudge and decree that defendant Sydelle Price is indebted to the plaintiff for said unpaid balance of taxes due and owing the United States in the sum of $9,963.57 plus interest as allowed by law.

2. That the plaintiff have such other and further

relief as to the Court may seem just and equitable in the premises.

JACK D. H. HAYS,
United States Attorney;

/s/ ROBERT S. MURLLESS,
Assistant U. S. Attorney.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, by her attorneys W. Lee McLane, Jr., and Nola McLane, for answer to the complaint alleges:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The claim stated in the complaint did not accrue within six years before the commencement of this action and is therefore barred by the provisions of Section 276 (c) of the 1939 Internal Revenue Code.

Third Defense

A statutory notice of deficiency as required by Section 272 (a) of the 1939 Internal Revenue Code has not been issued to defendant, and therefore this action is prohibited by law.

Fourth Defense

Defendant admits the allegations contained in paragraphs I and III of the complaint; alleges that she is without information sufficient to form a belief as to the truth of the allegations contained in paragraphs II and IV of the complaint; and denies the allegations contained in paragraph V of the complaint.

Wherefore, it is prayed that the plaintiff's prayer for relief be denied.

/s/ W. LEE McLANE, JR.,

/s/ NOLA McLANE,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 28, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

(1) Of the Truth of Matters of Fact and
(2) Genuineness of Documents
(Fed. R. of Civ. P., Rule 36, Title 28 U.S.C.A.)

Pursuant to Rule 36(a), Fed. R. of Civ. P., Title 28 U.S.C.A., plaintiff hereby requests defendant, Sydelle Price, to admit the following facts to be true and correct, or to respond hereto before the 14th day of November, 1956; and to admit to the

genuineness of the documents herein listed, and photostatic copies of which are hereto attached.

Facts.

1. In 1946, defendant, Sydelle Price, was copartner, with a 40% copartnership interest, in the Rona Company, a Chicago copartnership.

2. The informational return (Form 1065, filed in the Eastern District of Illinois) for said copartnership for fiscal year ending in calendar year 1946, reported net loss of said copartnership in the sum of $3,303.79.

3. The above-mentioned reported net loss was not a true statement, and required a redetermination and a computation of adjustment.

4. The aforementioned computation of adjustment (which was accepted for the defendant, Sydelle Price, by her husband and copartner, William Price, pursuant to "Acceptance of Revenue Agent's findings by a partnership or fiduciary," which was dated August 18, 1949), of reported net loss, correctly revealed additional net income in the sum of $73,915.70, which was actually income to said copartnership during said fiscal period.

5. Said redetermination and computation of adjustment correctly revealed an actual net profit to said copartnership, for said period, in the sum of $40,049.59.

6. Above mentioned redetermination and computation of adjustment (additional $73,915.70 net

income; $40,049.59 net profit) correctly revealed additional taxable income had been enjoyed by the copartners during the period.

7. Items of said adjustments, correctly allocable as taxable income experienced by defendant, Sydelle Price, during said period (tax liability therefore arising in 1946), are as follows:

(a)	(1)	Ordinary Income	$ 4,244.77
(b)	(2)	Short Term Capital Gain	723.47
(c)	(3)	Other Short Term Capital Gain	21,608.00
(d)		Total	$26,576.24

8. Defendant, Sydelle Price, filed no income tax return for the tax year 1946.

9. The foregoing items of taxable income, therefore, first revealed on the computation of adjustment necessary and in the substitute for income tax return for Sydelle Price (List October 14, 1949; Numbered 519079) resulted, in the regular course of the administration of Statutes for such cases provided, in an assessment on said list of $9,965.48 in taxes, and $1,498.09, an aggregate of $11,463.57, against the defendant.

10. Though the claim stated in Complaint did not accrued within six years of the commencement of this action, an offer in compromise was submitted on June 13, 1950, by taxpayer, on standard Form 656 (Exhibit 1), which was under consideration by the Commissioner of Internal Revenue until June

13, 1951, when it was withdrawn by letter (Exhibit 2).

11. Though statutory notice of deficiency under 26 U.S.C.A. 272(a), 1939, was not issued to defendant, defendant waived restrictions on assessment, issuance and service of statutory letter, pursuant to 26 U.S.C.A. 272(d), 1939, (Exhibit 3).

12. The taxes referred to in paragraphs 10 and 11, above, (being a deficiency of $9,965.48, plus interest in the sum of $1,498.09) were legally assessed on October 14, 1949, (assessment list; Exhibit 4).

13. Defendant paid $1,500 on said assessment on January 12, 1950 (Form 899, Exhibit 5), and there remains due and unpaid $9,963.57, together with interest as by statute provided.

Documents.

Exhibit 1—Offer in Compromise.
Exhibit 2—Letter.
Exhibit 3—Statutory Letter of Deficiency.
Exhibit 4—Assessment List.
Exhibit 5—Form 899.

Dated this 31st day of October, 1956.

JACK D. H. HAYS,
United States Attorney;

/s/ ROBERT S. MURLLESS,
Assistant United States Attorney, Attorneys for Plaintiff.

3.

On August 10, 1946, defendant executed a United States Treasury Form 870 which was received by the Commissioner of Internal Revenue on August 18, 1949. The said United States Treasury Form 870 provided in part as follows:

> "Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax * * * taxable year ended December 31, 1946, income tax in the sum of $9,965.48 * * *"

4.

Subsequently, on October 14, 1949, the Commissioner of Internal Revenue "assessed" against defendant for the taxable year 1946 the sum of $9,965.48 plus interest of $1,498.09 or a total of $11,463.57.

5.

Thereafter, on December 16, 1949, the Commissioner of Internal Revenue issued to defendant a letter commonly known as a ninety day letter asserting "deficiencies" for 1946 in penalties under Sections 291(a) and 293(a) of the Internal Revenue Code of $2,491.37 and $498.27, respectively. No deficiency in income tax for the taxable year of

EXHIBIT 2

201 West Jackson St.,
Phoenix, Arizona,

June 27, 1951.

Internal Revenue Agent in Charge,
417 S. Hill St.,
Los Angeles 13, Calif.

Att: Mr. J. B. McLeod,
Phoenix, Arizona.

Re: Offer in Compromise,
Serial No. IT-18-50,
June 13, 1950.

Dear Sir:

Please accept this letter as my request for withdrawal of the "offer in compromise" referred to above; for additional tax assessment for the year 1946; of Sydelle Price, formally of 39 West Adams St., Phoenix, Arizona.

Yours truly,

/s/ SYDELLE PRICE.

1946 was asserted against defendant in the said ninety day letter.

6.

A statutory notice of deficiency in Federal income tax for the taxable year of 1946 for the income tax involved in this cause has never been issued to defendant by the Commissioner of Internal Revenue.

7.

On January 12, 1950, defendant paid to the Commissioner of Internal Revenue the sum of $1,500.00 for the taxable year of 1946.

8.

The amount of the $11,463.57, referred to in Finding of Fact No. 4 remaining unpaid, after the payment of the $1,500.00, at the time the complaint herein was filed is $9,963.57 which is the amount of the judgment plus interest sought by plaintiff.

Conclusions of Law

1.

Section 272 (a) (1) of the Internal Revenue Code of 1939 authorizes a taxpayer to file a petition with the Board of Tax Appeals (Tax Court of the United States) for a redetermination of the deficiency after receipt of a statutory notice of deficiency from the Commissioner of Internal Revenue. The section further provides that until such notice of deficiency has been mailed to the taxpayer, no assessment of a deficiency and no restraint or proceeding in court for its collection shall be made.

EXHIBIT 3

IT:G:N:CPG

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Received: Aug. 18, 1949.

Sydelle Price

Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

Taxable year ended December 31, 1945, income tax in the sum of.....	$ 408.38
Taxable year ended December 31, 1946, income tax in the sum of	9,965.48
Amounting to the total sum of.....	$10,373.86

together with interest thereon as provided by law.

Date: 8-10-49.

/s/ SYDELLE PRICE,
(Taxpayer),
39 West Maryland Ave.,
Phoenix, Arizona.

Note—The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

I hereby certify that the attached photostat is a true copy of that portion of the October 14, 1946, Income Tax assessment list, Chicago, Illinois Collection District, indicating assessment of tax $9,965.48, interest $1,498.09, for the year 1946, Tax against Sydelle Price, 39 W. Maryland Ave., Phoenix, Arizona, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed 15th day of August, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal
Revenue, Chicago Illinois.

EXHIBIT 4-2

Assessment Certificate
Commissioner's Assessment List

ETS
Form 23C-1
Treasury Department
Internal Revenue Service

1st District of Illinois.
Month: October 14.
Year: 1949.

Additional Assessments made by Commissioner:

Personal	$191,849.80
Corporation	246,267.71
Withholding	
Estate and Gift Tax	1,007.71

Attachment:
Authorization to Offset Assessments Form 7986-E
Total Thereof: $7,409.48.

Total Assessments Includes Interest Assessments of $69,365.06 Pertaining to Income Taxes and $83.98 Pertaining to Estate and Gift Taxes.

Total Assessments	$439,125.22

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C. Office of Commissioner of Internal Revenue, October 14, 1949.

/s/ GEO. J. SCHOENEMAN,
Commissioner of Internal Revenue.

IT:CL:P-7

Int. Date: 10-17-49. Initialed BSH.

I hereby certify that the attached photostat is a true copy of the Assessment Certificate, Form 23C, certifying Income Taxes assessed on the October 14, 1949, List, Chicago, Illinois Collection District signed by George J. Schoeneman, District Director of Internal Revenue, under date of October 14, 1949, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed this day August 15, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal Revenue.

EXHIBIT 4-3

I hereby certify that the attached photostat is a true copy of that statement of Income Tax Due of October 14, 1949, Bill for $9,965.48, Interest $1,-498.09 for the year of 1946 Tax, Balance due $11,-

463.57, against Sydelle Price, 39 W. Maryland Ave., Phoenix, Arizona, on file in this office.

In witness whereof, I have hereunto set my hand and caused the seal of this office to be affixed this 15th day of August, 1956, at Chicago, Illinois.

/s/ D. J. LUIPPOLD,
District Director of Internal Revenue, Chicago, Illinois.

Statement of Income Tax Due

Form 7658—Revised April, 1948
Treasury Department
Internal Revenue Service

Collector's Copy I

Collector's Paid Stamp: [Blank.]

Notice is hereby given that there has been assessed against you the amount of tax, penalty and interest stated below. Demand is hereby made for the immediate payment of the unpaid balance thereof. If payment is not made within 10 days after date of this notice, the law provides that interest will be added at the rate of 6 percent per annum from the date shown below until paid.

Date: 10-24-49.

To avoid further interest the amount stated on this notice must be paid to Collector of Internal Revenue at ..... within 10 days from date stated above.

Name and Address:
Sydelle Price
39 W Maryland Ave.,
Phoenix, Arizona
10-14-49 519079 1946

Old Balance or Remarks		Assessment	Amount Paid	Balance Due
1040	SUB			
272 D	RAR	$9,965.48		
Int. to	INT	1,498.09		
9-17-49	.....			$11,463.57

To Insure Proper Credit, Return This Form With Remittance

[Title of District Court and Cause.]

RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS OF FACT AND GENUINENESS OF DOCUMENTS

Defendant, in answer to the plaintiff's request for admissions of fact and genuineness of documents served on the 31st day of October, 1956, says:

Facts

1. The truth of statement No. 1 in the request for admissions is admitted.

2. The truth of statement No. 2 in the request for admissions is admitted.

3. The truth of statement No. 3 in the request for admissions is denied.

4. The truth of statement No. 4 in the request for admissions is denied.

5. Defendant denies the truth of statement No. 5 in the request for admissions. However, defendant admits that a Revenue Agent's report, dated August 22, 1949, alleged that the Rona Company realized a net profit of $40,049.59 for the fiscal year ended August 31, 1946.

6. The truth of statement No. 6 in the request for admissions is denied.

7. The truth of statement No. 7 in the request for admissions is denied.

8. The truth of statement No. 8 in the request for admissions is admitted.

9. The truth of statement No. 9 in the request for admissions is denied. However, defendant ad-

mits that on October 14, 1949, an alleged additional tax of $9,965.48 plus alleged interest of $1,498.09 allegedly due from defendant is found on the Income tax assessment list prepared by the Chicago, Illinois, Collection District of the United States Bureau of Internal Revenue.

10. The truth of statement No. 10 in the request for admissions is denied. However, defendant admits that Exhibit 1 attached to the request for admissions was filed on June 13, 1950, and that Exhibit 2 attached to the request for admissions was filed on June 27, 1951.

11. The truth of statement No. 11 in the request for admissions is denied. However, defendant admits that a statutory notice of deficiency was not issued to defendant, and that Exhibit 3 was filed with the Commissioner of Internal Revenue.

12. The truth of statement No. 12 in the request for admissions is denied.

13. The truth of statement No. 13 in the request for admissions is denied. However, defendant admits that $1,500.00 was paid to the Commissioner of Internal Revenue on January 12, 1950.

Documents

With respect to Exhibits 1 through 3, it is admitted that each is a true and correct copy of documents filed by defendant with the Commissioner of Internal Revenue, but no admission whatsoever is made insofar as the legal effect, or lack of legal effect, of the said exhibits.

Insofar as Exhibits 4 through 5 are concerned, it is admitted that each is a true and correct copy of the documents described in the attesting certificates, but no admission of any kind is made regarding the legality, propriety or regularity of the exhibits or of their legal effect, or lack of it.

/s/ SYDELLE PRICE.

State of Arizona,
County of Maricopa—ss.

Subscribed and sworn to before me this 7th day of November, 1956.

[Seal] /s/ F. A. MILLER,
Notary Public.

My Commission Expires: July 8, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY, JANUARY 16, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

This case is called for trial. Robert S. Murlless, Esq., Assistant United States Attorney, is present for the Government. Lee McLane, Esq., is present for the defendant.

Both sides announce ready for trial.

Counsel for the Government states Government's case to the court.

Government's Case:

Jack C. McLeod is sworn and examined for the Government.

The following Government's Exhibits are admitted in evidence:

1. Waiver of Assessments, etc.
2. Letter and photostat of Portion of Assessment.
3. Offer in compromise and letter of withdrawal from compromise.
4. Offer in compromise and notice of rejection.
5. Letter from Wm. Price, dated 10/30/53.
6. Certification of Assessments.
7. Letter dated Dec. 16, 1949.

The Government rests.

Defendant's Case:

William Price is sworn and examined for the defendant.

The defendant rests.

Both sides rest.

It Is Ordered that the record show this case is submitted on briefs; that plaintiff is allowed 10 days to file opening brief, the defendant 10 days to answer, and plaintiff 10 days to reply.

[Title of District Court and Cause.]

MINUTE ENTRY, MARCH 19, 1957

Honorable Dave W. Ling, United States District Judge, Presiding.

This case having been submitted and by the court taken under advisement.

It Is Ordered that judgment will be entered for the defendant, upon findings to be submitted under the Rules.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been heard by the Court without a jury upon the pleadings, oral testimony and exhibits placed in evidence at the trial, and briefs having been submitted by the parties, this Court makes the following findings of fact and conclusions of law:

Findings of Fact

1.

This is an action seeking judgment from defendant in the sum of $9,963.57 for Federal income taxes and interest thereon allegedly due for the taxable year of 1946.

2.

Defendant is a resident of Phoenix, Arizona.

2.

Since the statutory notice of deficiency required to avoid the above prohibition of Section 272 (a) (1) was not issued to defendant with respect to the income tax sought by plaintiff in this cause, it follows that plaintiff may not obtain a judgment for the $9,963.57 sought in this cause unless defendant's execution of the United States Treasury Form, referred to in Finding of Fact No. 3, operates to relieve the Commissioner of the restrictions set forth in Section 272 (a) (1).

3.

Section 272 (d) of the Internal Revenue Code of 1939 provides that a taxpayer may waive the restrictions imposed by Section 272 (a) on the assessment and collection of the whole or any part "of the deficiency."

4.

When the language of Section 272 (d) was interpreted by the United States Court of Appeals for the Ninth Circuit, it was held that a waiver filed before a deficiency has been determined is premature and powerless to prevent the Commissioner's resort to a letter of deficiency. Mutual Lumber Co. v. Poe, 66 F. 2d 904 (C.A. 9th, 1933), cert. den., 290 U. S. 706. In short, a waiver or consent filed before the Commissioner has sent a notice of deficiency is premature and invalid. McCarthy v. Commissioner, 80 F. 2d 618 (C.A. 9th, 1935), cert. den., 296 U. S. 655; East Bay Water Co. v. McLaughlin, 24 F.

Supp. 222, (1938), Government's appeal to C.A. 9th dismissed on stipulation, 104 F. 2d 1016.

Nor are the above courts alone in the view that waivers of the restrictions established by Section 272 (a) (1) of the Internal Revenue Code of 1939 which are executed before the issuance of a statutory notice of deficiency are premature and invalid. Such an interpretation finds solid support in the legislative history of Section 27. For example, in discussing Section 274 (d) of the Internal Revenue Bill of 1926 (Section 272 (d) of the Internal Revenue Code of 1939) the Senate Finance Committee report, the text of which is found in Sen. Rep. No. 52, 69th Cong., 1st Sess. (1926) reprinted in 1939-1 Cum. Bull., Part 2, at 352, stated:

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in Section 274 (d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board* * * *" (Italics supplied.)

Since Section 274 (a) of the Internal Revenue Bill of 1926 which became Section 272 (a) of the Internal Revenue Code of 1939, provides that a tax-

payer cannot go to the Board of Tax Appeals (Tax Court of the United States, until there has been issued a notice of deficiency, it is clear that it was intended that the waiver subsection 272 (d) only applies after a notice of deficiency has been issued. This is the only conclusion possible in view of the above language that the waiver subsection 274 (d) does not take away the right of the taxpayer to take his case to the Board.

Subsequent legislative history is equally convincing that the view adopted by the United States Court of Appeals for the Ninth Circuit is correct. Thus, in 1938 a subcommittee of the Ways and Means Committee of the House of Representatives on January 14, 1938, made the following statements:

> "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), *a valid waiver cannot be given* by a taxpayer *prior to the formal determination* by the Commissioner, *as evidenced by a* 60 or *90 day letter that there is a deficiency in tax.*" (Italics supplied.)

Accordingly, the subcommittee recommended an amendment,

> "* * * to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right,

> at any time after a deficiency is proposed in any manner that the Commissioner may direct, *whether before or after the sending of the notice of deficiency*, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed." (Italics supplied.)

However, the proposed amendment did not become a part of the law. In fact, no change in Section 272 (d) occurred until the Internal Revenue Code of 1954 adopted the recommendation which had been made by the Ways and Means subcommittee in 1938. Thus, Section 6213 (d) of the Internal Revenue Code of 1954; the successor of Section 272 (d) of the Internal Revenue Code of 1939, reads as follows:

> "Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency." (Italics supplied.)

Certainly the addition of the phrase "whether or not a notice of deficiency has been issued" to Section 6213 (d) clearly reflects the belief of Congress that the law was otherwise prior to the passage of the Internal Revenue Code of 1954.

5.

Consequently, since the law as announced by the United States Court of Appeals for the Ninth Circuit holds a waiver filed prior to the determination of an assessment by the Commissioner to be premature and invalid, it follows that the Commissioner was not relieved of the restrictions set forth in Section 272 (a) (1) because defendant executed a United States Treasury Form 870 purporting to waive, pursuant to Section 272 (d), those restrictions.

6.

By virtue of the prohibition contained in Section 272 (a) of the Internal Revenue Code of 1939, prohibiting any assessment or proceeding in court for the collection of income tax provided for in Chapter I of the Internal Revenue Code of 1939, plaintiff is not entitled to judgment.

Judgment will be entered for the defendant in accordance with the above findings.

Dated this 10th day of April, 1957.

/s/ DAVE W. LING,
U. S. District Judge.

Receipt of Copy acknowledged.

Proposed Findings, Etc.: [Endorsed]: Filed March 25, 1957.

Findings, Etc.: [Endorsed]: Filed April 10, 1957.

United States District Court for the
District of Arizona

Civil Action, File Number 2441-Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SYDELLE PRICE,
Defendant.

JUDGMENT

This cause came on for trial before the Court without a jury on January 16, 1956, and the Court having directed judgment for defendant, it is hereby

Ordered, Adjudged and Decreed that plaintiff take nothing and that this action be dismissed on the merits, and that defendant recover from plaintiff his costs in this action.

Dated this 19th day of April, 1957.

/s/ DAVE W. LING,
United States District Judge,
for the District of Arizona.

The attached judgment is hereby approved as to form only.

JACK D. H. HAYS,
United States Attorney,
Attorney for Defendant:

By /s/ ROBERT S. MURLLESS.

Lodged April 16th, 1957.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that final judgment entered on the 19th day of April, 1957, which was pursuant to findings of fact and conclusions of law entered on the 10th day of April, 1957.

Dated this 15th day of May, 1957.

/s/ JACK D. H. HAYS,
United States Attorney,
Attorney for Plaintiff.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

MOTION AND ORDER FOR EXTENSION OF TIME WITHIN WHICH TO DESIGNATE THE RECORD AND DOCKET APPEAL

Comes now the United States of America, plaintiff, and moves the Court for an extension of time within which to designate the record and docket its appeal herein in the United States Court of Appeals for the Ninth Circuit to on or before the 13th day of August, 1957.

Dated this 21st day of June, 1957.

/s/ JACK D. H. HAYS,
United States Attorney,
Attorney for Plaintiff.

Order

Pursuant to motion under Rule 73(g) of the Rules of Civil Procedure, it is hereby

Ordered that the plaintiff, United States of America, may have to and until August 13, 1957, within which to designate the record, file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit.

Dated this 21st day of June, 1957.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed June 21, 1957.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed by the parties pursuant to Rule 75(h), Federal Rules of Civil Procedure, that the record on appeal shall include the following portion of the record previously omitted by error or accident:

The Reporter's Transcript of Proceedings.

Dated this 20th day of September, 1957.

SYDELLE PRICE.
McLANE AND McLANE,

By /s/ W. LEE McLANE, JR.,
Attorneys for Defendant.

JACK D. H. HAYS,
United States Attorney;

/s/ RALPH G. SMITH, JR.,
Assistant United States Attorney, Attorneys for Plaintiff.

[Endorsed]: Filed September 20, 1957.

In the United States District Court
for the District of Arizona

No. 2441

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SYDELLE PRICE,

Defendant.

PROCEEDINGS

Proceedings Had and Evidence Taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, on

Wednesday, the 16th day of January, A.D. 1957, at ten o'clock a.m.

Present:

JACK D. H. HAYS,
United States Attorney, By
ROBERT S. MURLLESS,
Asst. United States Attorney,
Appeared for the Plaintiff.

McLANE & McLANE, By
W. LEE McLANE, JR., and
NOLA McLANE,
Appeared for the Defendant.

The Clerk: Civil Number 2441 Phoenix. United States of America, plaintiff, versus Sydelle Price, defendant. For trial.

Mr. Murlless: Plaintiff is ready.

Mr. McLane: Defendant is ready, your Honor.

The Court: You may proceed.

Mr. Murlless: If the Court please. Counsel.

Preliminarily, if I might give some of the background of the case, and that which is proposed to be proved.

This case is an allegation for an assertion of an endeavor to render to judgment a claim for deficiency in taxes against one Sydelle Price.

Mrs. William Price failed to file a return in 1946. Preliminarily, however, the case was commenced by a joint Intelligence and Internal Revenue agent investigation of the income tax returns of the Rona Company, a copartnership, in 1946,

and, incidentally, the records of what was known as Rona Enterprises, which the company or copartnership succeeded about the first of January, 1945.

Disclosed in this investigation was the fact that large insurance premiums had been paid upon the life insurance policies of Rona Company, on the lives of the copartners, and the cost taken as expense, and deducted. There was conducted quite an investigation of that, which resulted in [2*] 1949 of a proposed additional income to the copartnership, with proposed deficiencies of tax due on an allocation basis from the copartners.

At this time about $20,000 was determined to be the proposed deficiency with respect to the income of the William Price interest.

At this time Mr. Price came up with the assertion that his wife was in reality the principal person interested in the income from the copartnership, the Price family's income from the Rona copartnership. He said to a degree of 80 per cent. And this is the origin of the assertion really against Sydelle Price, Mrs. Price, Mrs. William Price, of a tax deficiency for 1946.

In connection with this, and immediately after he had asserted that his wife really was the big receiver of income from Rona Company in 1946, it was proposed that against both William and his wife, Sydelle, there would be assessment of penalties for failure to file as against her, and negligence

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

penalties in connection with the proposed deficiencies for the years 1945 and 1946.

To this, the assertion of these penalties, the Price family, both of them, objected, protested. But they had no protest with respect to the assertion of the proposed deficiency of tax as to either of them.

Subsequently, and the nature of this lawsuit indicates [3] this, Mr. Price of course paid the deficiency with respect to him that had been established for 1945 and 1946. To the contrary, Mrs. Price, who about that time was characterized as a person without property.

He paid all his off. Hers still remains unpaid.

Now, in connection with the proposed deficiency and the protest with respect to the penalties for 1945 and 1946, both of the taxpayers executed a waiver of restrictions on the assessment and collection of these proposed deficiencies of tax. And it was assessed in October of 1949.

In the meantime, they took the proposed penalties that were proposed as to be assessed for 1945 and 1946, to the Tax Court, upon protest. They protested them and took them to the Tax Court.

Then several claims were filed for alleged overassessment, overpayment with respect to this proposed deficiency as to 1945 and 1946, particularly by Mrs. Price. Then offers in compromise were submitted, particularly by Mrs. Price, but by both of them, as I recall. Maybe not. Maybe it was after he had paid his tax.

Then the Tax Court matter was concluded where

protest had been made and litigation was undertaken of the negligence penalties.

In addition to the tax deficiency that is in [4] litigation here, there were negligence penalties that were litigated to the Tax Court.

The tax court litigation was concluded upon the stipulation of the Government that they would withdraw from their position that negligence penalties should be assessed; upon the basis of the collateral agreement by each of these taxpayers in the Tax Court that they would make no more claims, they would agree to the rejection of the claims, particularly by Mrs. Price, that had been made for refund, that they would make no further claim; and that at the Commissioner's request they would enter into a final closing agreement, particularly Mrs. Price would enter into a final closing agreement on the basis of the tax deficiency that is alleged in this complaint.

And on that basis, the Government did stipulate and the Tax Court decision did go pursuant to that stipulation, that the Government had withdrawn from its position that the negligence penalties should be assessed. and the Tax Court case was closed on that basis.

It is on this basis—this is the background and the sources from which the evidence comes which we assert reflect that Sydelle Price owes a tax liability of some $9,000, together with interest of some $1,500, for the tax year 1946.

The Court: All right. [5]

Mr. Murlless: Mr. McLeod, if your Honor please.

JACK B. McLEOD

called as a witness for the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Murlless:

Q. Will you state your name, please?

A. Jack B. McLeod.

Q. And what is your work, Mr. McLeod?

A. I am with the Internal Revenue Service.

Q. And for how long has that been your work?

A. About ten years.

Q. And is it now, in connection with the Phoenix office of the Director of Internal Revenue?

A. Yes.

Q. And do you come to the Court today in connection with the case, United States of America, versus Sydelle Price, as the custodian of certain of the official records and documents of the Internal Revenue Service? A. Yes.

Q. And I hand you Number 1. In general, what is it?

The Court: Better have it marked for identification.

The Clerk: Government's Exhibit 1 for identification. [6]

(Said Waiver of Assessment was marked as Government's Exhibit 1 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 1 for identification, Mr. McLeod, and ask you what that is?

(Testimony of Jack B. McLeod.)

A. Well, this is a Waiver of Restriction on Assessment and Collection of Deficiency and Tax. That's the title of the form.

Q. And with respect to what taxpayer, or what person does it appear to be effective or operative?

A. Sydelle Price.

Q. Do you know Mrs. Price, or Sydelle Price?

A. No.

Q. Did you ever see her? A. No.

Q. Do you know the defendant Sydelle Price's husband, Mr. William Price? A. Yes.

Q. Is he in court? A. Yes.

Q. In that connection did you have occasion to work the claims in the administrative procedure of the tax assessments, and claims of both Mrs. Sydelle Price and Mr. William Price? A. Yes. [7]

Q. With whom did you deal in connection with Mrs. Sydelle Price's claims, or the administrative procedure to determine a deficiency of tax?

A. Mr. Price.

Q. Always with Mr. Price? A. Yes.

Q. Who signed the documents?

A. Well, which document do you mean?

Q. Well, do you know Mr. Price's signature when put side by side, with Mrs. Price's?

A. I believe so.

Q. In the regular course, you have seen signatures that were represented by Mr. Price to have been signed by Mrs. Price? A. Yes.

Q. And by Mr. Price to have been signed by himself? A. Yes.

(Testimony of Jack B. McLeod.)

Q. Now, is this one of the documents that appears to have been signed by Sydelle Price?

A. Yes.

Q. And it is a Waiver of Restrictions, is it not?

A. Yes.

Q. What is its date? A. August 10, 1949.

Q. And does it purport to be a Waiver of Restrictions [8] on a particular amount of deficiency of tax? A. Yes.

Q. And what is that amount?

A. For the tax year 1945, it is $408.38. For the tax year 1946, it is $9,965.48.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 1 for identification.

Mr. McLane: No objection.

The Court: It may be received.

(Said Waiver was received in evidence and marked as Government's Exhibit 1.)

Mr. Murlless: May this be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 2 for identification.

(Said Letter and Photostat of Portion of Assessment List was marked as Government's Exhibit 2 for identification.)

Mr. Murlless: I move for admission in evidence of Government's Exhibit 2 for identification, which is qualified under the rule, I think counsel will find.

(Testimony of Jack B. McLeod.)

Mr. McLane: No objection.

The Court: It may be received.

(Said Letter and Photostat were received in evidence and marked as Government's Exhibit 2.) [9]

Q. (By Mr. Murlless): I hand you Government's Exhibit 2 in evidence, Mr. McLeod, and ask you what is that?

A. This is an Assessment List form showing the assessment against Sydelle Price.

Q. And in what sum is the assessment of tax itself?

A. It is for the year 1946, in the amount of $9,965.48.

Q. Is that the precise amount involved?

A. Yes.

Q. In Government's Exhibit 1 for identification?

A. Yes.

Q. And does the Assessment List, Government's Exhibit 2, show when the assessment was made?

A. October 14th, 1949.

Mr. Murlless: May this document be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 3 for identification.

(Said Offer in Compromise and Letter of Withdrawal was marked as Government's Exhibit 3 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 3 for identification, Mr. McLeod,

(Testimony of Jack B. McLeod.)

and ask you if that is also a document that was in your custody in connection with the files relative to Mrs. Sydelle Price?

A. Yes; this is an Offer in Compromise [10] form.

Q. An official document of the Internal Revenue Service? A. Yes.

Q. And in your custody in connection with this case? A. Yes.

Q. And what is its date?

A. It was dated June 1st, 1950, and received June 13th, 1950, in the office of the Collector of Internal Revenue.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 3 for identification.

Mr. McLane: No objection.

The Court: It may be received.

(Said document was received in evidence and marked as Government's Exhibit 3.)

Q. (By Mr. Murlless): To what account, if you can tell, does Exhibit 3 in evidence relate?

A. It relates to 1946 income tax liability of Sydelle Price. The total liability shown here is $11,463.57, which probably includes interest.

Q. Does it show the amount of tax alone?

A. No.

Q. Look at the face of it, Mr. McLeod, and see if it does not reflect the amount of tax, and the account to which it is effective? [11]

A. It states the additional tax for 1946 of $9,956.48.

(Testimony of Jack B. McLeod.)

Q. Does that sum you just read compare with the amount stated in Government's Exhibit 1 in evidence?

A. It seems to be somewhat—it seems to be a little bit different.

Q. What is the difference?

A. Nine dollars, apparently. $9,965.48, as compared with $9,956.48.

Q. Government's Exhibit 3 in evidence was submitted, or received by the Internal Revenue Service on June 13, 1950, was it not, Mr. McLeod?

A. Yes.

Q. Can you state that it does relate to the tax deficiency, or the tax assessment which is related in Government's Exhibit 2 in evidence?

A. Yes, it relates to that. The exhibit is related.

Q. To the same tax assessment? A. Yes.

Q. And to the same account? A. Yes.

Q. Will you state to the Court how you know that?

A. The account number relating to the original document, the return, is the same on the offer as well as on the assessment list.

Q. Where is that document? [12]

A. That is 519079; and 519079.

Q. Very well. Now, in connection with Government's Exhibit 3 in evidence, I will hand you another document, and ask you if you know what that is, if you will state generally what that is?

A. This is a written withdrawal of the Offer

(Testimony of Jack B. McLeod.)

in Compromise which is Exhibit 3, signed by Sydelle Price.

Mr. Murlless: If your Honor please, might Plaintiff's Exhibit 3 be supplemented by the Letter of Withdrawal which Mr. McLeod has just testified to, as being a part and parcel of the same exhibit? That is, it is a withdrawal of the Offer in Compromise.

Mr. McLane: No objection.

The Court: Oh, yes. It is attached to the Request for Admissions. I guess it is the same.

Mr. Murlless: Yes, sir.

Q. (By Mr. Murlless): This letter of Withdrawal relates to the Offer of Compromise which is Exhibit 3? Did I understand you to state that, Mr. McLeod? A. Yes.

Mr. Murlless: May this be marked for identification, if your Honor please?

The Clerk: Government's Exhibit 4 for identification.

(Said Offer in Compromise and Notice of Rejection was marked as Government's Exhibit 4 for identification.) [13]

Q. (By Mr. Murlless): I hand you Government's Exhibit 4 for identification, and ask you if this is also a document in your custody as custodian of the documents relating to Mrs. Sydelle Price, and an official document of the Internal Revenue Service? A. Yes.

Q. And what is it?

(Testimony of Jack B. McLeod.)

A. It is another Offer in Compromise submitted with respect to the original liability of Mrs. Price.

Q. Account number what, if it shows?

A. I beg your pardon?

Q. Does it state the account number to which it was an offer in compromise? Perhaps on the back there.

A. It states the account. Yes, it states the account—rather, assessment number here, account number.

Q. And what is that? Is it 590029, Mr. McLeod?

A. The number 590029. Or, pardon me, 590031, is the same on both Offers, but it refers to this account here, rather than the Return. It is another number.

Q. Very well, sir. Now, I hand you a document, and ask you in general what that is?

A. This is a Notice of Rejection of the Offer in Compromise, this Offer here, signed by the District Director.

Q. That is, when you speak of this Offer here, that is the second one, Government's Exhibit 4 for identification? [14]

A. Yes, the second offer.

Mr. Murlless: I move for the admission in evidence, if your Honor please, of Government's Exhibit 4 for identification, and move that this document, the letter to which Mr. McLeod has just testified, being a Notice of Rejection, be appended to Government's Exhibit 4, all in one exhibit.

Mr. McLane: No objection.

(Testimony of Jack B. McLeod.)

The Court: It may be received.

The Clerk: Government's Exhibit 4 in evidence.

(Said documents were received in evidence and marked as Government's Exhibit 4.)

Mr. Murlless: May this document be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 5 for identification.

(Said Letter dated 10/30/53 was marked as Government's Exhibit 5 for identification.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 5 for identification, Mr. McLeod, and ask you what that is?

A. This is a statement by William Price, dated October 30, 1953, in which he requests that his name be deleted from the Offer in Compromise, the second Offer in Compromise.

Q. It is a letter from William Price to the Internal [15] Revenue Service?

A. Yes, directed to myself.

Q. As part of the official documents of the Internal Revenue Service in your custody in connection with this case? A. Yes.

Q. Directed, as you say, to yourself?

A. Yes.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 5.

Mr. McLane: No objection.

The Court: It may be received.

(Testimony of Jack B. McLeod.)

(Said Letter was received in evidence and marked as Government's Exhibit 5.)

Q. (By Mr. Murlless): Have you caused the accounts of Sydelle Price in the Internal Revenue Service in the Phoenix office to be examined to determine what the current balance due under the proposed deficiency and the claim of the United States in this case is? A. Yes.

Mr. Murlless: May this be marked for identification, if your Honor please.

The Clerk: Government's Exhibit 6 for identification.

(Said Certification of Assessments was marked as Government's Exhibit 6 for identification.) [16]

Q. (By Mr. Murlless): I hand you a document marked Government's Exhibit 6 for identification, and ask you what that is?

A. This is a Certification by the responsible officer of the balance due on Sydelle Price on the 1946 tax liability.

Q. Is there a date on the exhibit?

A. Dated January 15, 1951.

Mr. Murlless: I move for the admission in evidence of Government's Exhibit 6 for identification.

Mr. McLane: No objection, your Honor.

The Court: It may be received.

(Said Certification was received in evidence and marked as Government's Exhibit 6.)

Mr. Murlless: Thank you very much, Mr. McLeod. Your witness.

Mr. McLane: No questions.

(Witness excused.)

Mr. Murlless: The Plaintiff rests, if your Honor please.

The Court: All right.

Mr. McLane: Your Honor, I don't believe it will be necessary to put any evidence on for the defendant, if we can have an agreement or understanding, if counsel desires, that in this case, with respect to this particular defendant, there was no statutory notice of deficiency issued to that [17] defendant with respect to the taxable year 1946, insofar as the liability proposed in this case is concerned.

If that can be stipulated and agreed to, it won't be necessary for me to put a witness on.

The Court: Do you agree to that?

Mr. Murlless: No, sir, we can't agree to that.

The Court: All right, that settles that.

Mr. McLane: Mr. Price, please.

WILLIAM PRICE

called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McLane:

Q. Will you state your name, please?

A. William Price.

(Testimony of William Price.)

Q. Would you please state for the record your relationship with Sydelle Price?

A. I am her husband.

Q. During the course of an audit and examination of Mrs. Price's 1956 Federal Income tax liability, did you in her behalf conduct negotiations with the Treasury Department concerning her liability? A. I believe you mean 1946?

Q. 1946, yes. [18] A. Yes, I did.

Q. During any period up to and including today, have you ever received from the Treasury Department or the Government a letter which was entitled at the top of the letter, "90-D," "90 day," which read as follows:

"Dear Mrs. Doe: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency or deficiencies, a deficiency of 'X' dollars, as shown in the statement attached.

"In accordance with the provisions of existing Internal Revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

"Within 90 days from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

"In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day.

(Testimony of William Price.)

Otherwise, Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

"Should you not desire to file a petition, you [19] are requested to execute the enclosed form and forward it to the District Director of Internal Revenue, Phoenix, Arizona. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

"Very truly yours. So and so (unknown name), Commissioner, by another signature, District Director of Internal Revenue."

Have you ever received a letter containing those statements?

Mr. Murlless: I am not sure that question is relevant. I object, unless he says whether or not his wife received it.

Q. (By Mr. McLane): Have you ever received on behalf of your wife, or has your wife, to your knowledge, ever received a letter with these statements in it?

A. I have not received one on her behalf, nor do I know of any she has received.

Q. During the course of this audit, have you examined and reviewed all documents received by Mrs. Price? [20] A. Yes, I have.

Mr. McLane: No further questions, your Honor.

(Testimony of William Price.)

Mr. Murlless: It may take just a few minutes to find the document with respect to which I would like to start examination of Mr. Price.

The Court: All right.

Mr. Murlless: We were unable to find it here.

The Court: Maybe it isn't there.

Mr. Murlless: Well, it may be, your Honor. I will go ahead without it.

Cross-Examination

By Mr. Murlless:

Q. It is your recollection, is it not, Mr. Price, that you did not seek to litigate certain penalties that had been proposed for the tax year 1945, in relation to your wife's proposed deficiency and her failure to file a return for 1946?

Mr. McLane: I object to the question as not being within the scope of cross-examination.

The Court: Call him as your witness, then. It is probably true.

Mr. Murlless: No, sir.

The Court: You can prove that by somebody else. This witness was only asked one question. [21]

Mr. Murlless: Very well, your Honor.

May this be marked for identification as Government's Exhibit 7.

The Clerk: Government's Exhibit 7 for identification.

(Said Letter dated December 16, 1949, was marked as Government's Exhibit 7 for identification.)

(Testimony of William Price.)

Q. (By Mr. Murlless): I hand you Government's Exhibit 7 for identification, and ask you if you have ever seen that before?

Did you state you received everything for your wife, Mrs. Sydelle Price?

A. Yes, I stated I received everything for her.

Q. Did you ever see that before?

A. It is probable. I can't be too certain.

Q. On the second page, does it refer to the tax assessment, deficiency assessment against her for 1946, in the sum of $9,965.48?

A. Yes, it does. But on the first page it refers to a deficiency and penalties only.

Q. Yes, the first page, it really is a 90-day letter with respect to the protest you filed with respect to the penalties for her for 1946?

A. That is right.

Q. But it relates and reflects the tax liability that [22] is involved in this claim, doesn't it?

Mr. McLane: I object to the form of the question. That is a conclusion of law.

The Court: The document will speak for itself.

Mr. Murlless: Very well. I move for the admission in evidence of Government's Exhibit 7.

Mr. McLane: No objection.

The Court: It may be received.

The Clerk: Government's Exhibit 7 in evidence.

(Said Letter of December 16, 1949, was received in evidence and marked as Government's Exhibit 7.)

Mr. Murlless: I have no further questions.

Mr. McLane: No further questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. McLane: The defendant has no further evidence to offer, your Honor, and respectfully requests that the Court reserve decision, and give defendant the opportunity to submit a short brief which we have prepared and will have in to you this afternoon.

The Court: All right.

Mr. Murlless: The Plaintiff moves for judgment, if your Honor please, and is prepared to submit the case.

The Court: All right. Do you want to answer that memorandum? [23]

Mr. Murlless: Yes, sir.

The Court: All right. Your memorandum will be in this afternoon?

Mr. McLane: Yes, sir.

The Court: What time do you want to reply to it?

Mr. Murlless: I don't know what he has in mind.

The Court: I don't either.

Mr. Murlless: Well, I think it can probably be answered tomorrow.

The Court: You are optimistic. Then you want time to reply to his?

Mr. McLane: Yes, sir. I would like ten days.

The Court: I will give you each ten days.

The Court will stand at recess.

(Which was all of the proceedings had on the hearing of the above-entitled cause.) [24]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 13th of September, A.D. 1957.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed September 20, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the

records and files of said Court, including the records and files in the case of United States of America, Plaintiff, versus Sydelle Price, Defendant, numbered Civ-2441 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached copies of minute entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Complaint.
2. Answer.
3. Plaintiff's Request for Admissions.
4. Defendant's Response to Request for Admissions.
5. Minute entry of January 16, 1957 (proceedings of trial).
6. Minute entry of March 19, 1957 (order for judgment).
7. Findings of Fact and Conclusions of Law.
8. Judgment, filed and docketed April 19, 1957.
9. Notice of Appeal.
10. Order Extending Time to Designate Record and Docket Appeal.
11. Designation of Contents of Record on Appeal.

I further certify that the following original exhibits are transmitted herewith as a part of this record on appeal, as designated, to wit:

Government's exhibits 1, 2, 3, 4, 5, 6 and 7, in evidence.

Witness my hand and the seal of said Court this 9th day of August, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, and keeper of the seal thereof, do hereby certify that the annexed and foregoing documents are the originals of Stipulation, Motion and Order Including Reporter's Transcript of Proceedings in the Record on Appeal, and Reporter's Transcript of Proceedings, filed in case No. Civ-2441 Phoenix, United States of America, Plaintiff, vs. Sydelle Price, Defendant. Said documents are certified as a part of the record on appeal in said case.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 24th day of September, 1957.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15662. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Sydelle Price, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed August 12, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

SYDELLE PRICE,

Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes now appellant, the United States of America, and cites the following points upon which it intends to rely for reversal of the judgment of the District Court:

1. The District Court erred in holding that the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax (Treasury Department Form 870) for the years 1945 and 1946 executed by taxpayer on August 10, 1949, was invalid because it was executed prior to the issuance of a statutory notice of deficiency for the taxable years.

2. The District Court erred in not holding that the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax (Treasury Department Form 870) for the years 1945 and 1946 executed by taxpayer on August 10, 1949, was valid and effectively waived the conditions precedent to assessment

of the taxes due provided in Section 272(a) of the Internal Revenue Code of 1939.

3. The District Court erred in not holding that the assessment of tax due for the year 1946 made by the Commissioner of Internal Revenue on October 14, 1949, was valid.

4. The District Court erred in entering judgment for the defendant.

5. The District Court erred in not entering judgment for the plaintiff, the United States of America.

/s/ JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed August 12, 1957.

63 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge; DENMAN and ORR, Circuit Judges

Minute entry of order of submission

April 11, 1958

Ordered appeal herein argued by Mr. Thomas N. Chambers, Attorney, Department of Justice, counsel for the Appellant, and by Mr. W. Lee McLane, Jr., counsel for the Appellee, and submitted to the Court for consideration and decision.

64 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Before STEPHENS, Chief Judge; DENMAN and ORR, Circuit Judges

Order setting aside the submission of the case, etc.

Filed July 14, 1958

It appearing that the judges of the panel to which the case is assigned for consideration and decision are of the opinion that the cause should be considered and decided by the Court en banc,

It is hereby ordered that the submission of the case be and hereby is set aside and the case returned to the Court en banc.

(S) ALBERT LEE STEPHENS,
Chief Judge.

(S) WILLIAM DENMAN,
Circuit Judge.

(S) WM. E. ORR,
Circuit Judge.

[File endorsement omitted.]

In accordance with the above, the cause is hereby assigned to the Court en banc for hearing.

(S) RICHARD H. CHAMBERS,
Circuit Judge.

(S) STANLEY N. BARNES,
Circuit Judge.

(S) FREDERICK G. HAMLEY,
Circuit Judge.

(S) OLIVER D. HAMLIN,
Circuit Judge.

(S) ALBERT LEE STEPHENS,
Chief Judge.

(S) WILLIAM HEALY,
Circuit Judge.

(S) WALTER L. POPE,
Circuit Judge.

(S) JAMES ALGER FEE,
Circuit Judge.

65 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN and JERTBERG, Circuit Judges

Minute entry of order of submission

October 13, 1958

Ordered appeal herein reargued by Mr. John Justin Pajak, Attorney, Department of Justice, counsel for the Appellant, and by Mrs. Nola McLane, counsel for the Appellee, and submitted to the Court for consideration and decision.

66 In United States Court of Appeals for the Ninth Circuit

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, Circuit Judges

Minute entry of order directing filing of opinion and filing and recording of judgment

January 2, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

67 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Opinion

January 2, 1959

Before STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against Sydelle Price to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that Mrs. Price had waived this requirement. It was her position, however, that this require-

ment may not be waived, and that her purported waiver was therefore ineffective for this purpose.

The trial court adopted defendant's view, and entered judgment dismissing the action. The government appeals. The only question here presented is whether the statutory requirement that the Commissioner of Internal Revenue mail a notice of deficiency to the taxpayer as a condition precedent to the bringing of such an action had been effectively waived.

The facts to be considered in deciding this question are not in dispute and may be briefly stated. On August 10, 1946, Mrs. Price executed United States Treasury Form 870, which
68 was received by the commissioner on August 18, 1949. In so far as here relevant, the form reads as follows:

"Sydelle Price

"Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:

* * * * *

"Taxable year ended December 31, 1946, income tax in the sum of..... $9,965.48

* * * * *

On October 14, 1949, the commissioner assessed against Mrs. Price, for the taxable year 1946, the sum of $9,965.48 plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the commissioner issued to her a so-called "ninety-day letter" asserting deficiencies for 1946. The deficiencies referred to in this letter were for penalties under §§ 291(a) and 293(a) of the Internal Revenue Code of 1939, in the amounts of $2,491.37 and $498.27, respectively.[1] No deficiency in income tax for the taxable year of 1946 was asserted against the taxpayer in this letter, nor has any other notice of deficiency concerning that year been mailed to her.

On January 12, 1950, Mrs. Price paid to the commissioner the sum of $1,500 for the taxable year of 1946. Of the amount assessed for the year 1946, as noted above, there then remained

[1] All statutory references in this opinion are to the Internal Revenue Code of 1939, unless otherwise indicated.

unpaid the sum of $9,963.57. This suit was brought to recover that amount.

Section 272(a), quoted in the margin,[2] requires that a notice of tax deficiency be mailed to the taxpayer as a condi-
69 tion precedent to the bringing of such a suit as this. Section 272(d) provides that the taxpayer may waive the restrictions provided in subsection (a).[3] The purported waiver which Mrs. Price signed and filed recites that it is made pursuant to § 272(d).

In Mutual Lumber Co. v. Poe, 9 Cir., 66 F. 2d 904, decided in 1933, this court held that a waiver prior to the mailing of a notice of deficiency is premature and invalid.[4] It was held in effect that the waiver contemplated by the statute amounts to a waiver of the right to petition the Tax Court for a redetermination, and since there can be no such petition until the taxpayer has received a notice of tax deficiency, there is nothing to waive until such a notice has been mailed.

---

[2] Section 272(a) as amended by the act of December 29, 1945, 59 Stat. 673, chap. 652, § 203, reads as follows:

"[(a) (1) Petition to the Tax Court of the United States.] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia, as the ninetieth day) the taxpayer may file a petition with the Tax Court * * * for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *"

[3] Section 272(d) reads:

"(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

[4] This case involved the effect of a waiver under § 274(d) of the Revenue Act of 1926. That section, however, corresponds with § 272(d) of the 1939 code.

The holding in Mutual was reaffirmed in McCarthy Co. v. Commissioner of Internal Revenue, 9 Cir., 80 F. 2d 618,
70 decided in 1935. It was also followed in East Bay Water Co. v. McLaughlin, D.C.N.D. Cal., 24 F. Supp. 222, decided in 1938.[5]

The purport of these decisions, in so far as the present case is concerned, is that a taxpayer may not waive the requirement that a notice of tax deficiency be mailed to him. They therefore appear to be dispositive of the present appeal.

The government contends, however, that the Mutual and McCarthy decisions are not controlling here because they were concerned with the timeliness of the assessment, not the right to sue without first mailing a notice of deficiency. In both Mutual and McCarthy the question presented was whether a waiver prior to any deficiency notice prevented a subsequent notice of deficiency from tolling the statute of limitations on the assessment and collection of taxes.

It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. But the basic question is the same in all three cases—was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit.

The government further argues that the rule laid down in these earlier cases was repudiated in Monge v. Smyth, 9 Cir., 229 F. 2d 361.

The taxpayer there sought to enjoin the collection of taxes and penalties. The government moved to dismiss the appeal on the ground that the court was without jurisdiction to entertain the action. The statute relied upon by the government was 26 U.S.C.A., § 3653(a), which provides:

71 "Except as provided in section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the as-

[5] An appeal taken in that case was dismissed by stipulation, 104 F. 2d 1016.

sessment or collection of any tax shall be maintained in any court."

The motion to dismiss was granted, and the taxpayer appealed. He sought to avoid the effect of 26 U.S.C.A., § 3653(a) by bringing himself within the exception provided in § 272(a). Under that exception (see footnote 2), the making of an assessment or the beginning of a proceeding or distraint during the time the prohibition of § 272(a) is in force "may be enjoined by a proceeding in the proper court." The prohibition referred to forbids the commissioner from making an assessment of a deficiency, or beginning or prosecuting a distraint or proceeding in court for its collection, until a notice of deficiency has been mailed and until the expiration of ninety days thereafter, and, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

Invoking these statutory provisions, the taxpayer contended that the prohibition of § 272(a) was in force, and the proceeding to collect the taxes could therefore be enjoined because no notice of deficiency had been issued. The court rejected this contention, holding that a waiver which the taxpayer had signed on U.S. Treasury Form 870 FS obviated the need for sending the formal notice.

If the waiver form signed in Monge is the legal equivalent of the waiver form signed in Mutual and McCarthy (and the instant case), the Monge case unquestionably announces a rule contrary to that stated in the earlier decisions. The taxpayer argues strenuously that the waiver forms are not equivalents. The government takes the opposite position.

We need not resolve this question, however, since careful analysis of the Monge opinion indicates that all that was said concerning the validity of the waiver is dictum. The court there stated, in the last paragraph of its opinion, that a deficiency notice had been sent to the taxpayer, and that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter. This being so, the exception to 26 U.S.C.A., § 3653, on which
72 the taxpayer relied, had no application, and dismissal of the taxpayer's suit for lack of jurisdiction was properly affirmed for that reason.

The prior decisions of this court cannot be overruled by dictum contained in a subsequent opinion. The rule announced in Mutual and McCarthy still stands.

The government asks us to re-examine that rule at this time. In this connection our attention is called to the language of the statutes in question, certain legislative history, and the decisions in other circuits adopting a contrary rule.[6]

We have reviewed the authorities mentioned, but have found nothing to convince us that we should now upset the long-standing rule of this circuit. It may also be noted that the desirability of achieving uniformity among the circuits is no longer an incentive for such an undertaking. Section 6213(d) of the 1954 Internal Revenue Code effectuates an amendment of § 272(d) to provide expressly that a waiver may be effective "whether or not a notice of deficiency has been issued."

AFFIRMED.

[File endorsement omitted.]

73 In United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Judgment

Filed and entered January 2, 1959

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

74 [Clerk's certificate to foregoing transcript omitted in printing.]

[6] Moore v. Cleveland Ry. Co., 6 Cir., 108 F. 2d 656; Associated Mutuals v. Delaney, 1 Cir., 176 F. 2d 179.

75 Supreme Court of the United States

No. 809, October Term, 1958

UNITED STATES, PETITIONER

v.

SYDELLE PRICE

Order allowing certiorari

May 18, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1959

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.—

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Appendix, *infra*, pp. 13–19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (Appendix, *infra*, p. 20.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939

Code) is essential to the validity of an assessment of federal income taxes where, prior to assessment, the taxpayer has filed (as provided in Section 272(d) of that Code) a waiver of restrictions on assessment and collection.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a)(1) [as amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in

force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

¶ Sec. 29.272–1. *Assessment of a Deficiency.*—
* * *

* * * * *

¶ (5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

STATEMENT

The essential facts are undisputed and may be summarized as follows:

On August 18, 1949, the Commissioner of Internal Revenue received a United States Treasury Form 870 executed by taxpayer pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, in which she waived the restrictions provided in Section 272(a) of the Code, and consented to the assessment and collection of a deficiency in income tax for the calendar year 1946 in the sum of $9,965.48, together with statutory interest. (R. 14, 26.) Thereafter, on October 14, 1949, the Commissioner assessed income taxes for the taxable year 1946 against taxpayer in the sum of $9,965.48, plus interest of $1,498.09, or a total of $11,463.57. On January 12, 1950, taxpayer paid $1,500 on this assessment, leaving a balance due of $9,963.57. (R. 16–20, 26, 27.) The Commissioner did not issue a statutory notice of deficiency for the tax in question.[1]

On March 14, 1956, the United States instituted suit in the United States District Court for the District of Arizona seeking judgment against taxpayer for unpaid taxes amounting to $9,963.57. (R. 3–5.) That court held that the filing of a waiver by taxpayer prior to the determination "of an assessment" by the Commissioner was premature and invalid, and that consequently the Commissioner was not relieved of the requirement, imposed by Section 272(a), of issuing a notice of deficiency to taxpayer with respect to the taxes for which the United States sought judgment. (R. 28, 32.) Accordingly, the District Court dis-

[1] On December 16, 1949, he did issue a notice to taxpayer asserting deficiencies in penalties for the taxable year, 1946, under Sections 291(a) and 293(a) of the Code, in the respective amounts of $2,491.37 and $498.27. (R. 26–27.)

missed the complaint. (R. 33.) The Court of Appeals affirmed. (Appendix, *infra*, p. 20.)[2]

REASONS FOR GRANTING THE WRIT

Section 272a(1) (*supra*, p. 2–3) declares that if there is a deficiency in tax the Commissioner is authorized to send the taxpayer a notice of such deficiency. Within 90 days of the mailing of such notice, the taxpayer may petition the Tax Court for a redetermination. During that same 90-day period, the Commissioner is barred from assessing or collecting the tax.

These procedures, however, are not inflexible. Subsection (d) (*supra*, p. 3) goes on to provide that "taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) * * * on the assessment and collection of the whole or any part of the deficiency."

The Government has long assumed, on the basis of Section 272(d), that if (as in this case) an agent makes a preliminary determination that there is a deficiency of a certain amount of tax and if the taxpayer signs a waiver as to the collection and assessment of that sum, there is no need to send a statutory notice of deficiency—no need, otherwise stated, to set in motion the procedures by which taxpayer might seek a redetermination. Thus, in *Associated Mutuals* v. *Delaney*, 176 F. 2d 179, 183 (C.A. 1st), Chief Judge Magruder referred to "the long-standing administra-

[2] If the Government's assessment was invalid, collection of the taxes involved is barred by limitations. Section 275(a) of the 1939 Code.

tive practice not to send deficiency notices if a waiver had already been filed by the taxpayer * * *."

According to the Ninth Circuit's decision in the instant case, this practice is not permissible. The court holds that, since the Commissioner did not send a deficiency notice, he could not proceed to assess and collect even though taxpayer had expressly consented to the assessment and collection of the sum involved. The court reasoned that until a determination of deficiency is made by the Commissioner and a statutory notice mailed, the waiver provisions do not come into play. Accordingly, it concluded, the waiver executed in this case was premature and invalid.

This holding is in direct and recognized conflict with decisions of other circuits (Appendix, *infra,* p. 19). We believe further that it is contrary to the language and purpose of Section 272(d). Finally, as we shall point out, the issue is of substantial practical importance, notwithstanding the fact that changes have been made in the 1954 Code.

1. The decision below takes note (Appendix, *infra,* p. 19) of the fact that a "contrary rule" was adopted by the First and Sixth Circuits in *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, and *Moore* v. *Cleveland Ry.* Co., 108 F. 2d 656, respectively.[3] It is also in conflict with a decision of the Court of Claims. *Roos* v.

[3] The court below relied upon its own prior decisions in *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706, and *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655, decisions which were characterized in the *Delaney* case, *supra* (176 F. 2d at 184), as involving "different problems."

United States, 31 F. Supp. 144.[4] It finds no support in the decisions of any other circuit.

In the *Delaney* case, *supra*, a taxpayer sought to enjoin a Collector from prosecuting proceedings for the collection of taxes. As here, an internal revenue agent had found a deficiency and taxpayer had signed a waiver of restrictions on the assessment and collection of the deficiency found. As here, taxpayer urged that the waiver was ineffective because no formal notice of deficiency had been sent by the Commissioner. The answer of the First Circuit was as follows (176 F. 2d at 182):

> * * * The language of the statute itself refutes this argument. Section 272(d) gives the taxpayer the right to submit a waiver "at any time", and it is to the taxpayer's advantage to file a waiver to a proposed deficiency because I.R.C. § 292(a), 26 U.S.C.A. § 292(a), imposes interest on deficiencies at the rate of 6% per year from "the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier." Several cases hold that a waiver to a proposed deficiency is effective to stop the running of interest thirty days after filing. [Citations omitted.] Furthermore, the right is given the taxpayer by § 272(d) "to waive the restrictions provided in subsection (a) of this

[4] And see *Diamond Alkali Co.* v. *Driscoll* (W.D. Pa.), decided June 13, 1940 (1940 C.C.H., par. 9526).

> section on the assessment and collection" of a deficiency; and reference back to § 272(a) discloses that the first of these "restrictions", or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency. As stated by Dean Griswold, a waiver to a proposed deficiency, under § 272(d), "allows the Commissioner to assess and collect the tax without first sending the taxpayer a deficiency letter which can be used as the basis for a petition in the Tax Court." Note, 57 Harv. L. Rev. 912, 914 n. 16 (1944).

The efficacy of a similar waiver, *i.e.*, a waiver executed in advance of any formal notice of deficiency, was also directly at issue in the *Moore* and *Roos* cases, *supra*. The precise question was whether execution of the waiver had been effective to stop the running of interest.[3] In both cases, it was held that the waiver did have that effect. In the *Moore* case, the Sixth Circuit declared (108 F. 2d at 659):

> The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner. In such cases the section offers a substantial inducement to the taxpayer to execute the waiver. If a waiver is of no avail until after final determination, there is little or no inducement to waive.

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[3] Taxpayers in those cases relied, respectively, upon the provisions of Section 292 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and Section 274(j) of the Revenue Act of 1926, c. 27, 44 Stat. 9, which provided that where a waiver of the

2. We believe that the decision below is plainly in error.

Section 272(a) provides that where the Commissioner determines that there is a deficiency in income taxes, he shall send a notice of such deficiency to the taxpayer by registered mail; that the taxpayer may have 90 days thereafter in which to file a petition for redetermination of that deficiency by the Tax Court; and that "[n]o assessment of a deficiency" and "no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period * * *". Section 272(d) expressly provides that the taxpayer "at any time" shall have the right by a signed notice in writing filed with the Commissioner "to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency". The waiver (R. 14) signed by taxpayer recites that it is executed pursuant to the provisions of Section 272(d), that the restrictions provided in Section 272(a) are waived, and that consent is given to the assessment and collection of a specified deficiency. The decision below fails to give effect to the language of the waiver and to the provisions of Section 272(d).

3. In reenacting the provisions of Section 272(d) as Section 6213(d) of the Internal Revenue Code of 1954, Congress added, after the words "at any time", the

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restrictions on the assessment and collection of a deficiency in tax had been filed, interest could be collected only to the end of the 30-day period after the filing of such waiver or to the date the amount was assessed, whichever was the earlier.

parenthetical phrase "whether or not a notice of deficiency has been issued." Thus, Congress has apparently laid to rest, in relation to cases arising under the 1954 Code, any possible question as to the meaning of the phrase "at any time." The question presented by the instant petition nonetheless remains one of substantial practical importance because of the large number of cases arising under the 1939 Code which may be affected by the ruling below.

Waivers of the kind involved in this case are commonplace. And, as pointed out above, the Commissioner has regularly relied upon the proposition that when a taxpayer executes a waiver consenting to the assessment and collection of a particular deficiency, there is no requirement that a formal notice be issued as a condition precedent to collecting that acknowledged deficiency.

There are countless delinquent taxpayers.[6] In many of the cases in which back taxes remain unpaid, either in whole or in part, the assessment was made on the basis of a waiver of restrictions, that is to say, without resort to the 90-day-letter procedures. Accordingly, there are numerous taxpayers with outstanding income tax obligations arising under the 1939 Code who will now be in a position, at least in the area covered by the Ninth Circuit, to resist further collection on the same ground successfully urged in this case—that the waiver was ineffective and the

[6] It is estimated by the Internal Revenue Service that, as of December 31, 1958, there were more than a million and a quarter active delinquent accounts, of which approximately 900,000 involved unpaid income taxes.

assessment invalid.[7] In many, if not most, of these cases a new assessment would be barred by limitations.[8]

There is a further important factor. If the decision below stands uncorrected, there will doubtless be numerous suits for refund filed by taxpayers who paid their taxes subsequent to executing a waiver of restrictions under Section 272(d). The theory will be advanced that the waivers were invalid and that the collection of the taxes was illegal. We do not say that the Government will be without valid defenses to such suits, but we do apprehend that, at the very least, the decision below will encourage a large volume of vexatious litigation.

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[7] The defense might be made either in suits for unpaid taxes, such as that here involved, or in foreclosure proceedings falling within Section 7403 of the 1954 Code or 28 U.S.C. 2410.

[8] It is impracticable to determine the exact number of cases which may be affected by the rule enunciated in the instant case since such an estimate would require a detailed file-by-file examination of records located in the field. However, in light of the long-settled practice of making assessments without sending a deficiency letter in instances where a waiver has been executed, it can be stated with assurance that the number is substantial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
A. F. PRESCOTT,
GEORGE F. LYNCH,
Attorneys.

APRIL 1959.

APPENDIX

United States Court of Appeals for the Ninth Circuit
No. 15662, Jan. 2, 1959

UNITED STATES OF AMERICA, APPELLANT,

v.

SYDELLE PRICE, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Before STEPHENS, *Chief Judge,* and HEALY, POPE, FEE, CHAMBERS, BARNES, HAMLEY, HAMLIN, and JERTBERG, *Circuit Judges*

HAMLEY, *Circuit Judge:*

The United States brought this action against Sydelle Price to collect an asserted unpaid balance of federal income taxes. One of Mrs. Price's defenses was that since no notice of deficiency had been issued the suit was prohibited by statute. The government contended that Mrs. Price had waived this requirement. It was her position, however, that this requirement may not be waived, and that her purported waiver was therefore ineffective for this purpose.

The trial court adopted defendant's view, and entered judgment dismissing the action. The government appeals. The only question here presented is whether the statutory requirement that the Commissioner of Internal Revenue mail a notice of deficiency to the taxpayer as a condition precedent to the bringing of such an action had been effectively waived.

The facts to be considered in deciding this question are not in dispute and may be briefly stated. On August 10, 1946, Mrs. Price executed United States Treasury Form 870, which was received by the commissioner on August 18, 1949. In so far as here relevant, the form reads as follows:

> Sydelle Price
>
> Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:
>
> * * * * *
>
> Taxable year ended December 31, 1946, income tax in the sum of $9,965.48.
>
> * * * * *

On October 14, 1949, the commissioner assessed against Mrs. Price, for the taxable year 1946, the sum of $9,965.48 plus interest of $1,498.09, or a total of $11,463.57. On December 16, 1949, the commissioner issued to her a so-called "ninety-day letter" asserting deficiencies for 1946. The deficiencies referred to in this letter were for penalties under §§ 291(a) and 293(a) of the Internal Revenue Code of 1939, in the amounts of $2,491.37 and $498.27, respectively.[1] No deficiency in income tax for the taxable year of 1946 was asserted against the taxpayer in this letter, nor has any other notice of deficiency concerning that year been mailed to her.

On January 12, 1950, Mrs. Price paid to the commissioner the sum of $1,500 for the taxable year of

[1] All statutory references in this opinion are to the Internal Revenue Code of 1939, unless otherwise indicated.

1946. Of the amount assessed for the year 1946, as noted above, there then remained unpaid the sum of $9,963.57. This suit was brought to recover that amount.

Section 272(a), quoted in the margin,[2] requires that a notice of tax deficiency be mailed to the taxpayer as a condition precedent to the bringing of such a suit as this. Section 272(d) provides that the taxpayer may waive the restrictions provided in subsection (a).[3] The purported waiver which Mrs. Price signed and filed recites that it is made pursuant to § 272(d).

In *Mutual Lumber Co.* v. *Poe,* 9 Cir., 66 F. 2d 904, decided in 1933, this court held that a waiver prior

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[2] Section 272(a) as amended by the act of December 29, 1945, 59 Stat. 673, chap. 652, § 203, reads as follows:

"[(a)(1) Petition to The Tax Court of the United States.] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia, as the ninetieth day) the taxpayer may file a petition with the Tax Court * * * for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *"

[3] Section 272(d) reads:

"(d) Waiver of restrictions. The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

to the mailing of a notice of deficiency is premature and invalid.[4] It was held in effect that the waiver contemplated by the statute amounts to a waiver of the right to petition the Tax Court for a redetermination, and since there can be no such petition until the taxpayer has received a notice of tax deficiency, there is nothing to waive until such a notice has been mailed.

The holding in Mutual was reaffirmed in *McCarthy Co.* v. *Commissioner of Internal Revenue,* 9 Cir., 80 F. 2d 618, decided in 1935. It was also followed in *East Bay Water Co.* v. *McLaughlin,* D.C.N.D. Cal., 24 F. Supp. 222, decided in 1938.[5]

The purport of these decisions, insofar as the present case is concerned, is that a taxpayer may not waive the requirement that a notice of tax deficiency be mailed to him. They therefore appear to be dispositive of the present appeal.

The government contends, however, that the Mutual and McCarthy decisions are not controlling here because they were concerned with the timeliness of the assessment, not the right to sue without first mailing a notice of deficiency. In both Mutual and McCarthy the question presented was whether a waiver prior to any deficiency notice prevented a subsequent notice of deficiency from tolling the statute of limitations on the assessment and collection of taxes.

It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government

[4] This case involved the effect of a waiver under § 274(d) of the Revenue Act of 1926. That section, however, corresponds with § 272(d) of the 1939 code.

[5] An appeal taken in that case was dismissed by stipulation, 104 F. 2d 1016.

to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. But the basic question is the same in all three cases—was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit.

The government further argues that the rule laid down in these earlier cases was repudiated in *Monge* v. *Smyth*, 9 Cir., 229 F. 2d 361.

The taxpayer there sought to enjoin the collection of taxes and penalties. The government moved to dismiss the appeal on the ground that the court was without jurisdiction to entertain the action. The statute relied upon by the government was 26 U.S.C.A., § 3653(a), which provides:

> Except as provided in section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The motion to dismiss was granted, and the taxpayer appealed. He sought to avoid the effect of 26 U.S.C.A., § 3653(a) by bringing himself within the exception provided in § 272(a). Under that exception (see footnote 2), the making of an assessment or the beginning of a proceeding or distraint during the time the prohibition of § 272(a) is in force "may be enjoined by a proceeding in the proper court." The prohibition referred to forbids the commissioner from making an assessment of a deficiency, or beginning or prosecuting a distraint or proceeding in court for its

collection, until a notice of deficiency has been mailed and until the expiration of ninety days thereafter, and, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

Invoking these statutory provisions, the taxpayer contended that the prohibition of § 272(a) was in force, and the proceeding to collect the taxes could therefore be enjoined because no notice of deficiency had been issued. The court rejected this contention, holding that a waiver which the taxpayer had signed on U.S. Treasury Form 870 TS obviated the need for sending the formal notice.

If the waiver form signed in Monge is the legal equivalent of the waiver form signed in Mutual and McCarthy (and the instant case), the Monge case unquestionably announces a rule contrary to that stated in the earlier decisions. The taxpayer argues strenuously that the waiver forms are not equivalents. The government takes the opposite position.

We need not resolve this question, however, since careful analysis of the Monge opinion indicates that all that was said concerning the validity of the waiver is dictum. The court there stated, in the last paragraph of its opinion, that a deficiency notice had been sent to the taxpayer, and that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter. This being so, the exception to 26 U.S.C.A., § 3653, on which the taxpayer relied, had no application, and dismissal of the taxpayer's suit for lack of jurisdiction was properly affirmed for that reason.

The prior decisions of this court cannot be overruled by dictum contained in a subsequent opinion. The rule announced in Mutual and McCarthy still stands.

The government asks us to re-examine that rule at this time. In this connection our attention is called to the language of the statutes in question, certain legislative history, and the decisions in other circuits adopting a contrary rule.[6]

We have reviewed the authorities mentioned, but have found nothing to convince us that we should now upset the long-standing rule of this circuit. It may also be noted that the desirability of achieving uniformity among the circuits is no longer an incentive for such an undertaking. Section 6213(d) of the 1954 Internal Revenue Code effectuates an amendment of § 272(d) to provide expressly that a waiver may be effective "whether or not a notice of deficiency has been issued."

Affirmed.

(Endorsed:) Opinion. Filed Jan. 2, 1959.

PAUL P. O'BRIEN, *Clerk.*

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[6] *Moore* v. *Cleveland Ry. Co.*, 6 Cir., 108 F. 2d 656; *Associated Mutuals* v. *Delaney*, 1 Cir., 176 F. 2d 179.

United States Court of Appeals for the Ninth Circuit

No. 15662

UNITED STATES OF AMERICA, APPELLANT

v.

SYDELLE PRICE, APPELLEE

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered January 2, 1959.

PAUL P. O'BRIEN, *Clerk.*

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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.....

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This brief is filed in opposition to the petitioner's prayer for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

QUESTION PRESENTED

The Government's statement of the question presented (Pet. 1-2) is inaccurate. If accepted, it contains within itself an answer favorable to the Government. This is so because of the following italicized words found in the question:

> "Whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939 Code) is essential to the validity of an assessment of federal income taxes where,

prior to assessment, the taxpayer has filed *(as provided in Section 272(d) of that Code)* a waiver of restrictions on assessment and collection." (Emphasis supplied).

The very question at issue is whether the subject waiver has complied with the requirements of and is within the meaning of Section 272(d) as read in conjunction with Section 272(a)(1). To postulate that the taxpayer has filed a waiver "as provided in Section 272(d)" is to beg the question.

Consequently, the respondent submits that the question is as follows:

"For taxable years prior to 1954, does the execution by a taxpayer of a U. S. Treasury Form 870 (as distinguished from a U. S. Treasury Form 870-TS), prior to the issuance of a statutory notice of deficiency by the Commissioner of Internal Revenue, relieve the Commissioner from the restrictions imposed upon him by Section 272(a) of the 1939 Internal Revenue Code?"

STATUTE INVOLVED

The statute involved is Section 272(a)(1) and 272 (d) of the 1939 Internal Revenue Code as set forth and italicized below:

"Sec. 272. Procedure in General.

(a)(1) Petition to Board of Tax Appeals. —

If in the case of any taxpayer, *the Commissioner determines* that there *is* a *deficiency* in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. *No* assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or *proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer*, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the begin-

ning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(d) Waiver of Restrictions.

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency."

(Emphasis supplied).

STATEMENT

There are two areas in which the Government's statement is not correct. The first misstatement is found in the first sentence where it is said that the Commissioner received a U. S. Treasury Form 870 executed by the taxpayer

> "pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, in which she waived the restrictions provided in Section 272(a) of the Code, and consented to the assessment and collection of a deficiency in income tax for the calendar year 1946 in the sum of $9,965.48 together with statutory interest." (Pet. 4)

Respondent submits that this is no more than a statement of preference which subsumes the answer to the question presented.

Secondly, the Government's statement emphasizes that the District Court held that the filing of a waiver by the taxpayer prior to the determination "of an assessment" by the Commissioner was premature and invalid. However, as pointed out in respondent's reply brief filed in the Ninth Circuit (Appellee's Br. 4), it is perfectly clear from a reading of the District Court's findings of fact and conclusions of law, and the cases relied upon therein, that the District Court meant "determination of a deficiency". That is, the terminology "determination of an assessment" was inadvertent as evidenced by the fact that the Commissioner does not and cannot determine an assessment, but may determine a deficiency.

Lastly, insofar as the statement of the case is concerned, it should be noted that the appeal in the Ninth Circuit was heard en banc and was followed by a unanimous decision by the full bench.

ARGUMENT

In its petition the Government assigns three major reasons in support of its prayer that a writ be issued. They are:

(1) The question is one of "substantial practical importance" because of the large number of cases arising under the 1939 Code which *"may be* affected" by the ruling below.

(2) There is a conflict among the Courts of Appeals.

(3) The decision of the Ninth Circuit in this case is erroneous.

Turning to the above reasons in the order set forth herein, the Court is asked to consider the following:

I

The Petition Presents No Important Question of Federal Law Which Needs To Be Settled By This Court

The sole question here is one of statutory construction. The petition recognizes that Congress has made the issue moot for all taxable years including and subsequent to 1954. This was accomplished by amending Section 272(d) of the 1939 Internal Revenue Code and providing in Section 6213(d) of the 1954 Internal Revenue Code that such a waiver may be executed "at any time" (Pet. 10). Nevertheless, the Government urges that the instant question, arising only under the 1939 Internal Revenue Code, should be reviewed because the question is one of "substantial practical importance" because of the large number of cases arising under the 1939 Code which *may be* affected by the ruling below (Pet. 10). But the possibility that there "may be" cases affected by the ruling does not mean, in the sense of Rule 19(b), that there is an "important question of federal law which has not been, but should be, settled by this court." Something more than a possibility is needed. Furthermore, it should be remembered that the Ninth Circuit's decision herein is controlling only with respect to taxpayers from the Ninth Circuit.

When one turns to look for the number of cases which may be affected, the petition offers only the statement that there are

countless delinquent taxpayers who are "estimated" to number 900,000. However, the Government does not set forth how many of this "estimate" live in the Ninth Circuit, nor how many involve years prior to 1954, nor has petitioner told the Court what the relationship is between the amount of dollar revenue involved and the requirement of Rule 19(b) that there be an important question of federal law which has not been but should be settled. Petitioner suggests that the "estimate" of 900,000 delinquent income tax accounts for unknown taxable years is no stronger an argument than the loss of "hundreds of millions of dollars of revenue" contention which was submitted by the same petitioner as a ground for issuance of a writ in their petition seeking review of the brick and tile percentage depletion cases. *United States of America v. Merry Brothers Brick & Tile Company, et al*, No. 220, October Term, 1957, Pet. 8. Since the writ did not issue in that matter, it is difficult to see how an *unknown* revenue loss, if any, from Ninth Circuit taxpayers is of greater importance.

Furthermore, it is not quite accurate to say, as the Government has, that delinquent Ninth Circuit taxpayers "will *now* be in a position" to "resist further collection" on the ground that the waiver was ineffective and the assessment invalid. (Emphasis supplied) The rule that such waivers were invalid has been the established law in the Ninth Circuit since 1933 when *Mutual Lumber Co. v. Poe*, 66 F. 2d 904 (C.A. 9th, 1933), cert denied, 290 U.S. 706, held such waivers to be premature and invalid if executed prior to the issuance by the Commissioner of a formal statutory notice of deficiency. Subsequently, the rule was reaffirmed in *McCarthy Co. v. Commissioner*, 80 F. 2d 618 (C.A. 9th, 1935), cert denied, 296 U.S. 655, and followed in *East Bay Water Co. v. McLaughlin*, 24 F. Supp. 222 (D.C.N.D. Cal., 1938), Government's appeal to C.A. 9th dismissed on stipulation, 104 F. 2d 1016.

The method by which petitioner has sought to avoid the long standing of the Ninth Circuit's rule so that the above word "now" might be used, and so that a sense of urgency could be conveyed

in its petition herein, was to argue by footnote (Pet. 6) that the *Mutual Lumber Co.* and *McCarthy* cases, *supra,* were "characterized in the *Delaney* case, . . . as involving 'different problems'." However, it has been accepted for many years by the looseleaf services, Mertens, and the U. S. House of Representatives that the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* held such waivers to be invalid. In view of the fact that opposing counsel usually differ as to the scope of a case's holding, respondent turns to those who have no stake in this litigation to see how disinterested parties have interpreted *Mutual Lumber Co. v. Poe, supra* and *McCarthy Co. v. Commissioner, supra.*

As shown below a Subcommittee of the Ways and Means Committee of the U. S. House of Representatives, the 1953 edition of the Commerce Clearing House Federal Tax Reporter, and Merten's treatise on Federal Income Taxation, all cite the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* as holding that a valid waiver cannot be given by a taxpayer prior to the formal determination of a deficiency as evidenced by a 90-day letter that there is a deficiency in tax.:

(1) "As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver *cannot* be given by a taxpayer *prior* to the formal determination by the Commissioner, *as evidenced by a 60 or 90 day letter* that there is a deficiency in tax". (Emphasis supplied)

Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., on Proposed Revisions of the Revenue Laws 1938.

(2) ".858 Filed before deficiency notice. —
Waiver filed at the time of examination of the books by a revenue agent who found an additional amount of taxes due was *not valid, where executed before the deficiency notice* was mailed, to stop the running of interest or *to free*

the Commissioner from the restrictions on assessment and *collection in Section 272(a):*

Mutual Lumber Co. v. Poe, (CCA-9) 3 USTC ¶ 1158, 66 Fed. (2d) 904. Cert. denied, 290 U.S. 706.

McCarthy Co. v. Com., (CCA-9) 35-2 USTC ¶ 9674, 80 Fed. (2d) 68. Cert. denied, 296 U.S. 655.

East Bay Water Co. v. McLaughlin, (D.C.) 38-2 USTC ¶ 9485. Government's appeal to CCA-9 dismissed on stipulation, 104 Fed. (2d) 1016.

".859—Contrary to the cases at .858, above, the following hold that a waiver on Form 870 signed prior to the mailing of a deficiency notice is effective to stop the running of interest and to waive the restrictions on assessment and collection, including the sending of a deficiency notice:

Roos v. U.S., (Ct. Cls.) 40-1 USTC ¶ 9223, 31 Fed. Supp. 144.

Moore v. Cleveland Ry. Co., (CCA-6) 40-1 USTC ¶ 9180, 108 Fed. (2d) 656.

Diamond Alkali Co. et al. v. Driscoll, (D.C.) 40-2 USTC ¶ 9526.

Associated Mutuals, Inc. v. Delaney, (CA-1) 49-2 USTC ¶ 9346, 176 Fed. (2d) 179.

D. P. J. Randall v. Riddell et al., (DC) 52-1 USTC ¶ 9207." (Emphasis supplied)

3 CCH 1953 Fed. Tax Rep. ¶ 1354 at p. 17,557.

(3) "Where the amount of the tax is not disputed, the signing of the waiver will save the taxpayer interest upon the amount of deficiency which he agrees is due.[51] *Despite considerable opposition,*[52] a waiver which has been filed before the determination of a deficiency and the sending of a notice by the Commissioner has been held sufficient to terminate the accrual of interest charges as of the 30th day after such filing.[53]

"[52]This was occasioned by the decision in Mutual Lumber Co. v. Poe, 66 F. (2d) 904 (CCA 9th, 1933) cert. den. 290 U.S. 706, 78 L. Ed. 606, 54 S. Ct. 373 (1933),

which resulted in a special ruling by the Bureau to the effect that a waiver must be filed *subsequent* to the issuance of a statutory deficiency notice in order to curtail the accumulation of interest, which was published in full at Par. 7, 124 of P-H Fed. Tax Service for 1939. This same result has been arrived at in East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (1938), appeal dismissed in 104 F. (2d) 1016 (CCA 9th, 1939), which held a prior waiver premature and invalid.

"[53]See Cleveland Ry. Co. v. Moore, 21 AFTR 1282 (U.S.D.C.,N.D. Ohio, 1937), aff'd 108 F (2d) 656 (CCA 6th, 1940), ...

In her discussion of 'The Proposed Internal Revenue Administrative Code,' 20 Taxes 390, at 398, (1942), Harriet Geary explains that the *contemplated* Sec. 2604 thereof, embodying restrictions on assessment and future deficiency notices, to subsection (c) on waiver of restrictions, there is added a new phrase granting the taxpayer the right to waive the restrictions contained in subsection (a) 'at any time after the date prescribed for filing the return.' *This addition was made necessary by a conflict of the decisions between the Ninth Circuit* Court of Appeals Mutual Lumber Co. v. Poe, 66 F (2d) 904, (CCA 9th, 1933), cert. den. 290 U.S. 706, 78 L. Ed. 606, 54 S. Ct. 373 (1934); McCarthy Co. v. Comm., 80 F (2d) 618 (CCA 9th, 1935), cert. den. 298 U.S. 655, 80 L. Ed. 1381, 56 S. Ct. 675 (1936), *which had held a waiver signed before the mailing of a deficiency notice invalid, and the Sixth Circuit Court of Appeals* (Moore v. Cleveland Railway Co., 108 F (2d) 656 (CCA 6th, 1940)), *which had held to the contrary . . .* " (Emphasis supplied)

9 Mertens, Law of Federal Income Taxation, ¶ 49.99 (1943).

Can it be said, after reviewing the above material, that this is a new problem or that the Government has not known for years that such waivers were invalid if executed prior to the issuance of a notice of deficiency? And if it has been cognizant of the Ninth Circuit's rule, should it now be granted certiorari because "The Government has long *assumed*" that "there was no need to send a statutory notice of deficiency"? What is happening is that al-

though the Government has known for the past 25 years that such waivers were invalid in the Ninth Circuit, it is now asking this Court to grant certiorari because it has long "assumed" that such waivers were valid. Yet all the Commissioner was required to do to avoid the problem was to comply with the law in the Ninth Circuit and issue a notice of deficiency.

Consequently, in light of the foregoing, it is submitted that there is no *important* question of federal law which *should be* settled by this Court.

II

The Conflict Among The Circuits Is Now A Moot Issue

Even though there is a conflict among the circuits on the question before the Court, it is one which has existed since 1940 when the Sixth Circuit handed down its decision in *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C.A. 6th, 1940) and a question which has already been resolved by Section 6213(d) of the 1954 Internal Revenue Code for all taxable years after 1953. In short, the conflict among the circuits is not about an issue which is a live one because the statute has been amended in a manner which prevents the problem from arising in the future. In such a case, certiorari has been denied despite the square conflict. See, e. g., *United States v. Abrams*, 344 U.S. 855; *Community Services, Inc. v. United States*, 342 U.S. 932; *Sokol Bros. Co. v. Commissioner*, 340 U.S. 952; *Beal v. United States*, 340 U.S. 852; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-7 (1953).

III

The Decision of the Ninth Circuit Was Not Erroneous

In support of its conclusion that the decision below is wrong, petitioner has cited certain of the language from Section 272(a) and (d) of the 1939 Internal Revenue Code. On the other hand, respondent submits that the Ninth Circuit's decision is supported

by the legislative history of Section 272(d) of the 1939 Internal Revenue Code and is the product of a sound analysis of the problem.

A

The Legislative History of Section 272(d), Internal Revenue Code of 1939.

In order to place the entire issue in its proper framework of reference, two things should be remembered. First, Section 272 of the 1939 Internal Revenue Code is the direct descendant of Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. Second, Section 274 of the Revenue Act of 1924, was added to the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[1] That is, Section 274 of the Revenue Act of 1924 was a procedural section which established the procedure by which a taxpayer invoked the jurisdiction of the Board of Tax Appeals. The terms of Section 274 of the Revenue Act of 1924 are set forth below in toto.[2]

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1. "Section 274(a): This subdivision provides for notice, and an opportunity for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." H. R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

2. Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided

A reading of Section 274 of the Revenue Act of 1924 reflects that if the Commissioner determined a deficiency in tax, the taxpayer "shall" be notified of such deficiency by registered mail. After receipt of the notice of deficiency, the taxpayer was then given 60 days to file an appeal with the Board of Tax Appeals. Thereafter, if the Board determined a deficiency, the amount so determined shall be assessed and paid upon notice and demand. On the other hand, if the Board disallowed the deficiency or part of it, the collector could not assess as to that amount, but he could without assessment, begin a proceeding in court for the collection of any amount so disallowed by the Board.

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in subdivision (a) of this section, or (2) before the expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or 3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

Under the above procedure, both the Commissioner and the taxpayer would appear before the Board to present their cases. If a decision was in favor of the Commissioner, the tax could then be assessed, and the taxpayer was left to his remedy in the courts for a recovery of the tax.[3] If that decision was in favor of the taxpayer, the Commissioner could not assess the tax, but was left to his remedy in the courts in a suit to collect the alleged additional tax due.[4]

However, there was no provision in Section 274, Revenue Act of 1924, whereby a taxpayer, who did not intend to appeal to the Board of Tax Appeals, could stop the running of interest after the day the notice of deficiency was issued until the Commissioner assessed the tax sometime after the 60 day period had expired. Section 274(c), Revenue Act of 1924, *supra*. Thus, a taxpayer was required to pay a minimum of 60 days extra interest simply because of a procedural block which prohibited the Commissioner from assessing the tax even though the taxpayer might have decided not to appeal to the Board of Tax Appeals.

Therefore, in 1926, Congress took up the problem and adopted the first waiver provision in the form of Section 274(d),[5] and said in explanation thereof, speaking through the Senate Finance Committee:[6]

> "The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but*

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3. H.R. Rep. No. 1, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 315, 321).
4. H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 247).
5. "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.
6. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 332, 352).

without taking away the right of the taxpayer to take the case to the Board. It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Emphasis supplied)

In other words, Section 274(d), Revenue Act of 1926, granted a right to the taxpayer, but without taking away any right to take the case to the Board. Since Section 274(a), Revenue Act of 1926, provided that a taxpayer cannot appeal to the Board until he has received a statutory notice of deficiency, it is obvious that the new waiver subsection only applied after the taxpayer had received the notice of deficiency. This is the only conclusion possible in view of the Senate Finance Committee statement that Section 274(d), Revenue Act of 1926, permitting waivers, does not take away the right of the taxpayer to appeal to the Board. Clearly, the above-quoted language of the Senate Finance Committee shows that the waiver provisions of Section 274(d), Revenue Act of 1926, were designed to relieve the taxpayer from paying interest on an asserted deficiency, after a notice of deficiency was issued, for the 60 day period within which an appeal could be taken to the Board.

In view of the above quoted explanation, by the Senate Finance Committee, of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co. v Poe, supra,* that waivers filed before the issuance of a notice of deficiency were premature and powerless to prevent the Commissioner's resort to a notice of deficiency, and said, at page 907:

" . . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Emphasis supplied)

Possibly this understanding was one of the reasons why Judge Sawtell also said, at pages 906-907:

"Section 274(a), supra, (26 USCA 1048), contains the

initial and important condition, 'if in the case of any taxpayer the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section."

Nor was it unexpected that the *Mutual Lumber Co. v. Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co. v. Commissioner*, *supra*, wherein Judge Garrecht said, at page 621:

"It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, *is premature and therefore invalid.* In Mutual Lumber Co. v. Poe, 66 F. 2d 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . ." (Emphasis supplied)

Following the *Mutual Lumber Co. v. Poe*, and *McCarthy v. Commissioner* cases, *supra*, and because these were the only decided cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was taken up in 1938 by a Subcommittee on Ways and Means.

The report[7] issued by this Subcommittee stated:

"As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906 certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amendment to what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

". . . to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall

[7] Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess. on Proposed Revisions of the Revenue Laws 1938.

have the right, at any time after a deficiency is proposed in any manner that the Commission may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed."

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d), Internal Revenue Code of 1939 (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[8] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[9] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[10] This language was designed to overcome the *Mutual Lumber Co. v. Poe* and *McCarthy v. Commissioner* cases, *supra*, holding that waivers to be valid under Section 272(d) of the 1939 Internal Code must be preceded by the issuance of a statutory notice of deficiency.[11]

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following

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8. Sen. Rep. No. 52, 69th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 352, 352).

9. Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

10. Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote 53 at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

11. *Ibid.*

italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions—The taxpayer shall at any time *(whether or not a notice of deficiency has been issued)* have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra,* correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said the waiver section did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Furthermore, Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means Committee that the Ninth Circuit had held such waivers invalid, and it had seen Section 2604 of the Internal Revenue Administrative Code proposed by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the 1939 Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Respondent submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code is strong support of the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Court said it meant in the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra.* Also when this later legislative history is considered in the light of the language of the original Senate Finance Committee report which introduced the same statutory language found in Section 272(d) of the 1939 Internal

Revenue Code, it is difficult to see how one could support a contention that the *Mutual Lumber Co. v. Poe* and *McCarthy v. Commissioner* cases, *supra,* should be overruled unless those cases holding contra *(Moore v. Cleveland Ry. Co., supra,* and *Associated Mutuals, Inc. v. Delaney, supra,)* are better reasoned or are based on statutory language which is clear and unambiguous. These cases will be examined in Point B hereof.

B

Moore v. Cleveland Ry. Co. and Related Cases Are Contrary To The Ninth Circuit's Decisions in Mutual Lumber Co. v. Poe and McCarthy v. Commissioner and Are Not The Better View

Seven years after the Ninth Circuit decided *Mutual Lumber Co. v. Poe, supra,* and five years after it decided *McCarthy v. Commissioner, supra* the first conflicting decision was handed down by the Sixth Circuit in *Moore v. Cleveland Ry. Co., supra.* All of the other contra decisions came later, and a reading of them will reveal that each rests upon and cites as authority, *Moore v. Cleveland Ry. Co., supra.* Therefore since the latter case is the fountain head of the view that waivers filed prior to issuance of a notice of deficiency are valid, to the extent that the Sixth Circuit's opinion in *Moore v. Cleveland Ry. Co., supra,* is poorly reasoned or based upon inadequate research, all of the other decisions are severely weakened.

An analysis of the opinion in the *Moore* case, *supra,* reveals that Judge Simons disregarded the Ninth Circuit interpretation in *Mutual Lumber Co. v. Poe, supra,* and in *McCarthy v. Commissioner, supra,* because, in his judgment, the Ninth Circuit's view took no account of "the phrasing of the Statute, the manifest purpose of 272(d), its history, or administrative practice". Turning to each of these factors in reverse order, the following is noted:

Administrative Practice

The administrative practice referred to is not elaborated on

further in Judge Simons' opinion. However, let it be assumed that it was the consistent practice of the Commissioner, prior to 1940, not to issue a statutory notice of deficiency, as required by Section 272 of the 1939 Internal Revenue Code, and its predecessors, once a taxpayer signed a waiver form under the purported authority of Section 272(d), Internal Revenue Code of 1939. If this was the case, the Commissioner was engaging in such practice during a seven year period when the only court decisions interpreting Section 272(d) and its predecessors had held such waivers to be invalid. *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra.* How can an administrative practice which violates the only reported court decisions as to the meaning of Section 272(d) support a contrary interpretation of Section 272(d)? Furthermore, what is the relevance or logical relationship between administrative practice and the meaning of a statute?

The History of Section 272(d)

Insofar as Judge Simons' reliance on the history of Section 272 (d) is concerned, it is necessary to point out that he did not cite or mention the 1926 Senate Finance Committee report, *supra,* which made the flat statement that the waiver subsection (Section 274(d), Revenue Act of 1926) permitted a waiver, "but without taking away the right of the taxpayer to take the case to the Board". Consequently, the Sixth Circuit did not deal with the problem of how the taxpayer could still have the right to appeal to the Board of Tax Appeals unless a notice of deficiency was issued prior to the filing of a waiver.

Furthermore, the strength of Judge Simons' historical supports must be evaluated in the light of his statements about the failure of Congress to amend Section 272(d) in 1938 even though a committee report recommended an amendment because of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra,* which invalidated such waivers. The opinion stated, at page 660:

> "It is true that no such amendment has yet been adopted by the Congress. The report from which we quote, however,

was made on January 14, 1938, and the grave concerns, domestic and international, which since that date have engrossed the Congress, and of which we take judicial notice, permit no adverse inference to be drawn from such failure, as appears to have been drawn in East Bay Water Co. v. McLaughlin, supra."

The respondent submits that the problems, both domestic and international, which confronted the Congress in 1954 were equally grave, and yet action was taken not only to amend Section 272 (d) but to finish a complete revision of the Internal Revenue Code. Where there has been a failure of Congress to act, after notice that the only existing case law held invalid those waivers filed before issuance of a notice of deficiency, it is doubtful that inferences drawn from such a failure to amend the law can be avoided simply by taking judicial notice that the 1938 Congress had other problems. If so, no inference is ever justified respecting the failure of Congress to amend legislation since it always has other domestic and international problems. What the historical reasoning of the *Moore v. Cleveland Ry. Co., supra,* opinion says in effect is that while Congress did not change what it recognized was the law as interpreted by the only reported decisions, namely that waivers were invalid if signed before a deficiency notice was issued, nevertheless the legislative history proves that such waivers are valid.

It is submitted that the legislative history of Section 272(d), reviewed in A hereof, considered along with the substantive content of Judge Simons' contentions respecting the legislative history, reflect that *Moore v. Cleveland Ry. Co., supra,* is not to be preferred over the Ninth Circuit's decisions in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy v. Commissioner, supra.*

Manifest Purpose of Section 272(d)

Next the Sixth Circuit referred to the "manifest purpose" of Section 272(d) saying, at page 659, that:

"The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner . . ."

Respondent urges that a statutory purpose is not ascertained merely by labeling a preferred statement of purpose as "manifest" and following it with unsupported statements respecting the purpose of the statute. To begin with, the above-quoted language from *Moore v. Cleveland Ry. Co., supra,* is flatly contradicted by the previously cited language of the 1926 Senate Finance Committee report, *supra,* which stated that the purpose was to permit a taxpayer to pay the tax and stop the running of interest, "but without taking away the right of the taxpayer to take the case to the Board". Certainly it was not the intent of Congress in adopting Section 272(d) that the taxpayer's tax liability be settled if he was still to have the right to take the case to the Board. Rather it was simply to allow him to pay the alleged tax after issuance of a notice of deficiency and stop the running of interest. Furthermore, it has always been the law that the execution of a U. S. Treasury Form 870 did not settle a taxpayer's liability. In fact, further deficiencies may be claimed by the Commissioner after execution of such waivers. Thus, the purpose of Section 272(d) could not have been "to permit the taxpayer to settle his tax liability". Also, it is incorrect to say its purpose was to allow the Government to get its money. A taxpayer could always pay the asserted tax, prior to passage of Section 274(d), Revenue Act of 1926, but the taxpayer could not stop the running of interest because the tax could not be assessed.

Consequently, it is suggested that the "manifest" purpose of Section 272(d), as determined by *Moore v. Cleveland Ry. Co., supra,* is not what that opinion says it is.

The Phrasing of the Statute

Finally, *Moore v. Cleveland Ry. Co., supra,* relied on the phrasing of the statute as support for its refusal to follow *Mutual Lumber v. Poe, supra,* and *McCarthy v. Commissioner, supra,* saying at page 659:

> ". . . A deficiency is defined by § 271(a) as 'the amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return . . .' It would seem,

therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commission or his agents. *True, it is, that before there has been ascertainment, a waiver is too indefinite to avail the taxpayer as a bar to interest, or the Commissioner in collection.* Once the deficiency has been *ascertained*, however, *even though but tentatively*, and there is waiver with respect to the amount so ascertained, no reason appears why to that extent the waiver is not valid so as to permit assessment and collection to go forward with dispatch. The restrictions waived are in the taxpayer's interest and, if satisfied with the preliminary determination, he may make an earlier settlement of his liability so as to avoid further interest. This seems to be the clear meaning of § 272(d) which recites that 'the taxpayer shall at any time have the right, etc.' If by that section the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so. While it is true that there may be no appeal from a determination until it is final, this is not the only restriction provided by § 272(a). The waiver releases the Commissioner from obligation to wait 60 days after the mailing of the deficiency notice before making assessment or collection of tax." (Emphasis supplied)

The above reasoning should be closely examined before this Court grants certiorari because of it.

First, Section 272(a), which is the applicable section when interpreting Section 272(d), does not refer to "deficiency" as defined in Section 271(a), Internal Revenue Code of 1939. Instead it says:

> "If . . . the Commissioner determines that there is a deficiency . . ., the Commissioner is authorized to send notice of such deficiency to the taxpayer . . ."

Thereafter, Section 272(a) imposes restrictions against the Commissioner until he has issued such a "notice" of deficiency. Then Section 272(d) provides that "The taxpayer shall at any time have the right to waive those restrictions on the assessment and collection of *the deficiency*." Certainly the phrase "the deficiency" found in Section 272(d) can only refer to the deficiency "de-

termined" by the Commissioner referred to in Section 272(a). If Section 272(d) waives the restrictions set forth against assessing and collecting the deficiency which restrictions are set forth in the third sentence of Section 272(a), surely the meaning of "deficiency" is not determined by referring to an entirely different section such as Judge Simons has done in turning to Section 271 (a). The words "the deficiency" found in Section 272(d), which were not quoted by Judge Simon, qualify the words "shall at any time" found in the initial portion of the sentence. Section 272(d) simply means, as the Ninth Circuit held, that a taxpayer may waive the restrictions imposed upon the Commissioner by Section 272(a) upon the collection or assessment of "the deficiency". However, that deficiency must be ascertained or determined before it can be waived.

Judge Simons says there can be a deficiency before one has been determined, but interest on such a "deficiency" cannot be waived. However, he goes on to say that once it has been ascertained, even tentatively, interest on a tentative deficiency can be waived. This, it is submitted, is threading the needle in rather fine fashion. How can there be "ascertainment" on a "tentative" basis?

Not only is this a contradiction in terms, but Section 272(a) provides that the Commissioner must "determine a deficiency" and send a notice or certain restrictions are imposed. The section does not mention ascertainment on a tentative basis. The preliminary report of a Revenue Agent is not a deficiency, and a taxpayer cannot appeal to the Tax Court from such a provisional report. And if there can be no appeal without a notice of deficiency, how can waivers permitted by Section 272(d) not take away the right to appeal to the Board if there is no determination of a deficiency and no notice of a deficiency issued to the taxpayer before the waiver becomes valid?

When Section 272(d) permits a waiver of the restrictions against collection and assessment of "the deficiency", it means just what the Ninth Circuit said it means. There must be a de-

termination of a deficiency.

Finally the Sixth Circuit said, at page 659:

> ". . . If by that section (272(d)) the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so . . ."

This is exactly what Congress did say when the 1926 Senate Finance Committee reports stated that the filing of such waivers did not take away the right of the taxpayer to appeal to the Board. Also, Congress made it clear in 1954 when Section 6213(d) added the phrase "whether or not a notice of deficiency has been issued."

In the light of the foregoing material concerning *Moore v. Cleveland Ry. Co., supra,* the cases which follow it, and the other contentions respecting the interpretation of the statute contained herein, respondent submits that the Ninth Circuit's decisions in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* correctly interpret the language of Section 274 (a) and (d), Revenue Act of 1926, which later became Section 272(a) and (d) of the 1939 Internal Revenue Code.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1959

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 48

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 65–70) is reported at 263 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1959. (R. 70.) The petition for certiorari, filed on April 1, 1959, was granted on May 18, 1959. (R. 71.) Jurisdiction is given by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Subsection (a) of Section 272 of the Internal Revenue Code of 1939 prohibits the assessment and

collection of federal income taxes until after the Commissioner has mailed to the taxpayer a formal notice of deficiency (commonly known as the 90-day letter). Subsection (d) of Section 272 provides that a taxpayer "shall at any time have the right * * * to waive the restrictions provided in subsection (a) of this section" on assessment and collection of the tax.

The question presented is whether a notice of waiver executed by a taxpayer during the audit of his return by the Internal Revenue Service, but before issuance of a 90-day letter, is invalid on the theory that the waiver provisions of subsection (d) do not come into play until after the 90-day letter is sent. Stated otherwise, may a taxpayer waive in advance the issuance of a 90-day letter?

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by

this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2(a)(1) of the Act of December 17, 1943, c. 346, 57 Stat. 601, and Sec. 14(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date

the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

* * * * *

(26 U.S.C. 292.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.272.1. ASSESSMENT OF A DEFICIENCY.

* * * * *

(5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

STATEMENT

On August 10, 1949, during the course of an audit by Internal Revenue Agents of her federal income tax return for the year 1946, the taxpayer executed a United States Treasury Department Form 870, captioned "Waiver of restrictions on assessment and

collection of deficiency in tax" (Govt. Ex. 1; R. 14, 26). So far as here relevant, that waiver reads as follows:

> Pursuant to the provisions of Section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the restrictions provided in Section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in tax:
>
> * * * * *
>
> Taxable year ended December 31, 1946, income tax in the sum of $9,965.48.
>
> * * * * *

On October 14, 1949, the Commissioner assessed income taxes for the taxable year 1946 against the taxpayer in the sum of $9,965.48, plus interest of $1,498.09, or a total of $11,463.57. On January 12, 1950, the taxpayer paid $1,500 on this assessment, leaving a balance due of $9,963.57. The Commissioner did not issue a statutory notice of deficiency (90-day letter) for the tax in question.[1] (R. 18–19, 26, 27; Govt. Ex. 6.)

On March 14, 1956, the United States instituted suit in the United States District Court for the District of Arizona seeking collection of the unpaid taxes in the amount of $9,963.57, plus statutory interest.

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[1] On December 16, 1949, the Commissioner did issue a notice to taxpayer asserting deficiencies in penalties for the taxable year 1946 under Sections 291(a) and 293(a) of the Code, in the respective amounts of $2,491.37 and $498.27. (R. 26–27.)

(R. 3–5, 25.) The district court held that the filing of a Form 870 notice purporting to waive, pursuant to Section 272(d) of the Internal Revenue Code of 1939, the restrictions set forth in Section 272(a) on the assessment and collection of a deficiency in tax was "premature and invalid" where such waiver was filed "prior to the determination of an assessment by the Commissioner". (R. 32.) Accordingly, the complaint was dismissed. (R. 33.) The Court of Appeals, sitting *en banc,* affirmed. (R. 65–70.)

SUMMARY OF ARGUMENT

The court below has held that waiver by a taxpayer of the restrictions provided in Section 272(a) of the 1939 Code on the assessment and collection of a deficiency in tax is invalid if filed prior to the time the Commissioner issues a formal notice of deficiency (90-day letter). This holding is contrary to the clear terms of Section 272(d), which provides that taxpayers may execute such waivers "at any time", and cannot be justified by considerations of relevant legislative policy or administrative practice.

Section 272(a) authorizes the Commissioner to mail a notice of deficiency to a taxpayer in any case where he determines a deficiency in tax. The purpose of the notice is to inform a taxpayer of the nature and amount of the deficiency determined and to afford the taxpayer an opportunity to contest it, prior to payment, in the Tax Court. The taxpayer has ninety days after the mailing of the notice within which to petition the Tax Court for a redetermination of the deficiency, and Section 272(a) further provides that no assessment of the deficiency and no distraint or

proceeding in court for its collection shall be made, begun, or prosecuted until expiration of the period within which the taxpayer may petition the Tax Court for a redetermination, and, if a petition has been filed, until the Tax Court's decision has become final.

Section 272(d) expressly provides, however, that the taxpayer shall "at any time" have the right by a signed notice in writing filed with the Commissioner "to waive the restrictions" provided in Section 272(a) "on the assessment and collection of the whole or any part of the deficiency." The manifest purpose of Section 272(d) is to enable taxpayers, by filing such waivers, to stop the accrual of interest (imposed by Section 292(a)) on a deficiency either 30 days after the filing of the waiver or on the date the deficiency is assessed, whichever is the earlier.

The Form 870 waiver filed by the taxpayer in this case recites that it is executed pursuant to the provisions of Section 272(d), that the restrictions provided in Section 272(a) are waived, and that consent is given to the assessment and collection of a specified deficiency. This waiver is in terms absolute and unqualified, not conditional, and the Government was therefore entitled to institute suit to collect the tax owing without first issuing a formal deficiency notice under Section 272(a).

The basic restriction imposed by Section 272(a), and which Section 272(d) gives taxpayers the right to waive, is that the Commissioner cannot assess and collect a tax deficiency until expiration of the period following the mailing of a deficiency notice. It would defeat the purpose of these statutory provisions, as

well as be contrary to the plain language of the notice of waiver, if a taxpayer could, by unilateral action which may be taken "at any time", stop the accrual of interest on unpaid taxes and yet not be bound by the waiver of restrictions on the assessment and collection of the deficiency. The interest which a taxpayer thereby saves has, as its *quid pro quo,* his consent to the immediate assessment and collection of the deficiency in taxes specified in the waiver. Necessarily, under this statutory scheme the requirement of Section 272(a) that the Commissioner issue a formal 90-day deficiency notice—the statutory prerequisite to the filing of a petition for review in the Tax Court—is eliminated. There is no reason for extending to a taxpayer an opportunity to litigate a proposed deficiency, where he has already consented to its assessment and collection. To hold otherwise would deny to taxpayers the opportunity to realize the financial savings in interest which accrue from the filing of a waiver before assessment.

ARGUMENT

The waiver filed by taxpayer pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939 relieved the Commissioner of the requirement of Section 272(a) that a formal notice of deficiency be issued prior to assessing the tax and instituting suit for its recovery

The court below has held that a waiver executed by a taxpayer on the standard form (Form 870) pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939, *supra,* p. 3, is "invalid for any purpose" if filed before the Commissioner has mailed a formal notice (90-day letter) of

his final determination of a deficiency in tax. (R. 68.) The decision below, which is in conflict with the decisions in other circuits, is, we believe, contrary to the language, legislative history, and policy of the statute and appears to distort the scheme established by Congress for fair, prompt, and efficient determination of tax disputes.

1. The text and background of the statutory provisions, and the long-standing administrative practice

The Board of Tax Appeals (now the Tax Court) was created by Congress in 1924[2] to furnish to taxpayers a forum in which they could litigate the amount and validity of proposed deficiencies in certain types of federal taxes without being required to pay the amount of tax in question and then sue for its recovery.[3] To afford taxpayers the opportunity to litigate first and pay afterwards, Section 272(a) of the Internal Revenue Code of 1939, *supra*, p. 2,[4] authorizes the Commissioner to mail to a taxpayer notice of a deficiency in income tax which he has determined; and provides, for the protection of the

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[2] By Section 900 of the Revenue Act of 1924, c. 234, 43 Stat. 253. By Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798, which amended Section 1100 of the Internal Revenue Code of 1939, it was provided that thereafter the Board of Tax Appeals should be known as the Tax Court of the United States.

[3] *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716, 721; *Everett Knitting Works* v. *Commissioner*, 1 B.T.A. 5; *Newsom* v. *Commissioner*, 22 T.C. 225, 227, affirmed *per curiam* on other grounds, 219 F. 2d 444 (C.A. 5th); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11, 12–13 (C.A. 2d); *Daugette* v. *Patterson*, 250 F. 2d 753, 757 (C.A. 5th).

[4] Originally Section 274(a) of the Revenue Act of 1924, *supra*.

taxpayer, that no assessment or collection of the deficiency shall be made or begun until the period within which the taxpayer may petition the Tax Court for a redetermination of the deficiency has expired, and, if a petition has been filed, until the Tax Court's decision has become final.

In 1926, when Congress first gave to the Board of Tax Appeals jurisdiction to determine overpayments in taxes[5] in addition to its jurisdiction to redetermine deficiencies, it also enacted a provision, Section 274(d) (which became Section 272(d) of the 1939 Code), which gave taxpayers the right "at any time", by a signed notice in writing, filed with the Commissioner, to waive the restrictions provided in Section 274(a) (Section 272(a) of the 1939 Code) on the assessment and collection of the whole or any part of a deficiency.[6] The manifest purpose of Section 272(d) is to stop the accrual of interest if a taxpayer waives the restrictions of Section 272(a), thus permitting the immediate assessment and collection of the deficiency.[7] In such event, Section 292(a), *supra*, p. 3, which provides for the assessment and collection of interest at the rate of 6% per annum upon the amount determined as a deficiency

[5] Section 284(e) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (Section 322(d) of the Internal Revenue Code of 1939).

[6] Such waivers are not final closing agreements; hence, additional deficiencies may be determined. *Botany Mills* v. *United States*, 278 U.S. 282; *Payson* v. *Commissioner*, 166 F. 2d 1008 (C.A. 2d). However, it may be the basis for estoppel if circumstances warrant it. *Cain* v. *United States*, 255 F. 2d 193 (C.A. 8th); *Daugette* v. *Patterson*, 250 F. 2d 753 (C.A. 5th).

[7] See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 659 (C.A. 6th), and *Payson* v. *Commissioner*, 166 F. 2d 1008, 1009–1010 (C.A. 2d).

from the date prescribed for payment of the tax to the date the deficiency is assessed, further provides that, in case of a waiver under Section 272(d), interest shall be assessed and collected to the 30th day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. Form 870, the form of waiver filed herein (R. 14–15), was expressly designed for the purpose of enabling taxpayers and the Commissioner to realize the benefits of these statutory provisions.

In the interpretation and application of these sections and the corresponding provisions of prior Revenue Acts, it has been a long-standing administrative practice of the Commissioner not to send deficiency notices if a waiver has previously been filed by the taxpayer. *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, 183 (C.A. 1st); *Moore* v. *Cleveland Ry. Co.,* 108 F. 2d 656, 660 (C.A. 6th). As the First Circuit has said, the repeated reenactment of these statutes by Congress should be regarded as giving "at least tacit approval to this practice". *Associated Mutuals* v. *Delaney, supra,* p. 183. See also *Helvering* v. *Winmill,* 305 U.S. 79, 83. In any event, we think that the language and purpose of Section 272(d) are clear and that the Commissioner is relieved of the restriction of sending a formal deficiency notice in any case where a taxpayer has filed a waiver pursuant to the provisions of Section 272(d).

Section 272(d), which was first enacted as Section 274(d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, permits a taxpayer to settle his tax liability and the Government to get its money without delay where no

controversy remains between the taxpayer and the Commissioner. See *Moore* v. *Cleveland Ry Co.*, 108 F. 2d 656, 659 (C.A. 6th). Under the provisions of Section 274 (a) and (b) of the Revenue Act of 1924, (the forerunners of Section 272(a) of the 1939 Code), the Commissioner was precluded from assessing the deficiency in tax until the lapse of the period following the mailing of a deficiency notice during which a taxpayer could appeal to the Board, or, if an appeal was filed, until the Board had entered its decision determining that there was a deficiency. Furthermore, Section 274(f) of the 1924 Act (corresponding to Section 292(a) of the 1939 Code, *supra*) imposed interest at 6 percent per annum on the amount determined by the Commissioner or by the Board of Tax Appeals as a deficiency from the date on which the original tax or installments for the year involved became due to the date on which the deficiency was assessed. It is important here, however, that the 1924 Act contained no provision for the stopping of interest on a deficiency during the period that the Commissioner was precluded from making an assessment.

Congress took note of this fact in enacting the Revenue Act of 1926, *supra*, by incorporating therein Section 274(d) which expressly provided that "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency". At the same time, by Section 274(j) of the 1926 Act, Congress reenacted Section 274(f) of the 1924 Act requiring

the collection of interest on a deficiency, but added that in the case of a waiver under Section 274(d), interest should be assessed only "to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier".[8] In its report[9] pertaining to the Revenue Act of 1926, the Senate Finance Committee, which had recommended the provisions of Section 274 (d) and (j), made the following explanatory statement:

> The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board. It is provided in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time.[10]

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[8] Section 274(j) of the 1926 Act, *supra*, was reenacted as Section 292 of the Revenue Acts of 1928, 1932, 1934, 1936, 1938 and appears as Section 292(c) of the 1939 Code.

[9] S. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 Cum. Bull. (Part 2) 332, 352).

[10] It should be noted that when the bill (H.R. 1, 69th Cong., 1st Sess.) was reported to the Senate by the Senate Finance Committee, and accompanied by S. Rep. No. 52, Section 274(d) of that bill read as it does in Section 272(d) of the 1939 Code, but contained an additional sentence reading: "Such waiver

In a report made in 1938 (Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3d Sess., on Proposed Revision of the Revenue Laws, 1938), a subcommittee of the House Ways and Means Committee stated (p. 53) that "[i]n order to enable the Government to collect admitted deficiencies" in an orderly and expeditious manner "without the delay necessarily involved in the issuance of a formal notice of deficiency," and also to enable taxpayers to curtail the interest period on such deficiencies "by permitting the Government to make an earlier assessment of the tax than otherwise would be possible," the Bureau of Internal Revenue has entered into cooperative agreements with taxpayers; that it has been "a practice of long standing" in the Bureau to endeavor to secure a signed agreement of a taxpayer to additional taxes proposed by an Internal Revenue Agent as the result of a field investigation, and, also, to taxes proposed in letters from the Commissioner "mailed as preliminaries to the issuance of the formal notice of deficiency" authorized in Section 272(a) of the Revenue Act of 1936,[11] and corresponding provisions of prior Revenue Acts; and that it had further been the practice to regard such a signed agreement as a valid

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shall not bar the taxpayer from receiving a credit or refund under subdivision (e) of Section 284 if the decision of the Board which has become final determines an overpayment of tax in respect of the year to which the waiver relates." Though this latter provision was retained in the Senate version of the bill, it was stricken by the Conference Committee (H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 40 (1939-1 Cum. Bull. (Part 2) 361, 369)) and does not appear in the Revenue Act of 1926 as finally enacted.

[11] C. 690, 49 Stat. 1648.

waiver under Section 272(d) of the Revenue Act of 1936, *supra,* and corresponding provisions of prior Acts, for the purpose of computing interest on deficiencies agreed to in accordance with Section 292 of the Revenue Act of 1936, *supra,* and corresponding provisions of prior Acts.

The subcommittee then referred to two decisions of the Ninth Circuit (the same court that decided the instant case) in *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706, and *McCarthy Co. v. Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655, which had held that a valid waiver could not be given by a taxpayer prior to the formal determination by the Commissioner, as evidenced by a 60 or 90-day letter, that there was a deficiency in tax. The subcommittee then expressed its belief (p. 54) "that the language of the statute is already sufficiently clear" to establish the validity of waivers given prior to issuance of a formal deficiency notice, but nevertheless felt compelled, in view of the denials of certiorari in those cases, to recommend an amendment "to insure the validity of waivers given before the mailing of the deficiency letter," such amendment to provide that (p. 54):

> the taxpayer shall have the right at any time after a deficiency is proposed in any manner that the Commissioner may direct, whether before or after the sending of the notice of deficiency as provided in subsection (a) of that section, to waive by a signed notice in writing, and all restrictions or conditions, however imposed, on the immediate assessment and collection of the whole or any part of the deficiency so proposed.

Having stated its recommendation, the subcommittee added (p. 54) that the proposed amendment would "furnish a clear and unquestionable statutory basis for a long-established and satisfactorily functioning departmental procedure", and be conducive to the early settlement of controverted issues without the necessity for litigation, while at the same time retaining for the taxpayer "his present privilege of paying deficiencies under appeal" and thereby terminating the running of deficiency interest.

While the proposed amendment was not adopted as part of the Revenue Act of 1938 (for reasons which are not apparent, the legislative history being barren on the matter), it was enacted as part of Section 6213(d) of the Internal Revenue Code of 1954.[12] The provisions of Section 6213(d) of the 1954 Code are identical with those of Section 272(d) of the 1939 Code except for the addition of a parenthetical phrase making clear that the taxpayer should have the right to file a waiver "at any time (whether or not a notice of deficiency has been issued)". Although the District Court in the instant case was of the opinion that the addition in 1954 of this phrase "clearly reflects" the belief of Congress that the law was otherwise prior thereto, it is to be noted that the reports of the House Ways and Means Committee[13] and of

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[12] That section reads as follows:

"(d) *Waiver of Restrictions.*—The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency."

[13] H. Rep. No. 1337, 83d Cong., 2d Sess., p. A405 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4552).

the Senate Finance Committee [14] stated that "[t]he only material change from existing law" was made in subsection (b)(3) of that section, which contained a new provision providing that any amount paid as a tax, or in respect of a tax, might be assessed upon the receipt of such payment notwithstanding the restrictions on assessment contained in subsection (a), and a further provision that if such payment was made after the mailing of a notice of deficiency, the assessment should not deprive the Tax Court of jurisdiction over the deficiency determined without regard to such assessment. In the light of these statements and the subcommittee report on Proposed Revisions of the Revenue Laws of 1938, previously referred to, we suggest that it is a plausible inference that the 1954 amendment was merely of a clarifying and declaratory nature, and that Congress did not thereby imply that the law as it existed prior to enactment of the 1954 Code did require issuance of a deficiency notice prior to assessment and collection of taxes where a taxpayer had previously filed a waiver of statutory restrictions on the assessment and collection of a tax.

2. The construction of the statute in the lower courts.

Although the Ninth Circuit has held that a taxpayer may waive the restrictions on the assessment and collection of a specified deficiency, it has, as already indicated, held that a taxpayer may not waive the right to appeal to the Tax Court until a formal deficiency has been determined by the Commissioner and notice

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[14] S. Rep No. 1622, 83d Cong., 2d Sess., p. 573 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5222).

thereof mailed to the taxpayer. *Mutual Lumber Co.* v. *Poe,* 66 F. 2d 904, certiorari denied, 290 U.S. 706; *McCarthy Co.* v. *Commissioner,* 80 F. 2d 618, certiorari denied, 298 U.S. 655; cf. *Monge* v. *Smyth,* 229 F. 2d 361, certiorari denied, 351 U.S. 976. See also *Roos* v. *United States,* 31 F. Supp. 144 (C. Cls.), and *Moore* v. *Cleveland Ry. Co.,* 108 F. 2d 656 (C.A. 6th), where the sole question related to the effect of such waivers upon the accrual of interest, but where those courts stated, as did the Ninth Circuit, that waivers filed prior to the Commissioner's determination of a deficiency were ineffective to waive a taxpayer's right to appeal to the Board of Tax Appeals. On the other hand, the First Circuit has specifically held that such waivers "obviated the need for the Commissioner to send a formal deficiency notice and precluded appeal to the tax Court". *Associated Mutuals* v. *Delaney,* 176 F. 2d 179, 183. See also *Payson* v. *Commissioner,* 166 F. 2d 1008, 1009–1010 (C.A. 2d); 57 Harv. L. Rev. 912, 914, n. 16 (1944); 9 Mertens, *Law of Federal Income Taxation,* Sections 49.02, 49.37, 49.99, 49.100;[15] Monograph of the Attorney General's Committee on Administrative Procedure, Part 9, S. Doc. No. 10, 77th Cong., 1st Sess. (1941). In the last-cited study, it was stated (p. 11, fn. 55):

> If no notice of deficiency has been sent when the waiver is signed, its execution in effect waives the privilege of going to the Board of Tax Appeals, since the jurisdiction of the Board depends upon the sending of a deficiency

[15] Corresponding sections of 9 Mertens, Law of Federal Income Taxation (Rev. ed.), are Sections 49.81, 49.115, 49.139 and 49.140.

notice which the waiver relieves the Commissioner of doing.[16]

The courts have also upheld the validity of Form 870 waivers[17] for the purpose of stopping the accrual of interest even though filed prior to the mailing of a formal deficiency notice. *Roos* v. *United States, supra; Moore* v. *Cleveland Ry. Co., supra.* See also *United States* v. *Goldstein,* 189 F. 2d 752 (C.A. 1st), holding that an "offer" (Treasury Department Form 870–TS) of waiver of the restrictions imposed by Section 272(a) did not stop the accrual of interest. In that case the court pointed out, however, that the taxpayer could have accomplished this purpose by filing a waiver on Form 870 which permitted the Commissioner to immediately assess and collect the deficiency.

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[16] This is in accord with the statement made by the Ninth Circuit in *Monge* v. *Smyth, supra,* p. 368 (but which that court in the instant case characterized as "dictum", R. 69):

"Section 272(d) provides that the taxpayer may waive the restrictions on the 'assessment and collection * * * of the deficiency' provided in Section 272(a). The first of these restrictions to be met before the Commissioner may make assessment and restraint is the mailing to the taxpayer of a notice of the determination of a deficiency. A waiver to a proposed deficiency 'allows the Commissioner to assess and collect the tax without sending the taxpayer a deficiency letter which can be used as a basis for a petition in the Tax Court.' The waiver obviated the need of sending the formal deficiency notice and precluded appeal to the Tax Court."

And see and cf. 1949 C.C.H., Vol. 3, par. 1354.847.

[17] The waivers involved in *Mutual Lumber Co.* v. *Poe, supra, McCarthy Co.* v. *Commissioner, supra.* and *Roos* v. *United States, supra,* were Form 870 waivers entitled "Waiver of Right to File a Petition with the United States Board of Tax Appeals". In 1931 that form was changed to read as in the

In the *Roos* case, *supra,* the Court of Claims remarked (pp. 150–151):

> As above stated, the waiver by plaintiff of the restrictions mentioned in section 274(a) on assessment and collection of the amount specified in the waiver was effective and was independent of the waiver of her right to appeal to the Board of Tax Appeals as to such amount. When the Commissioner, in his final determination, subsequently determined that there was a deficiency in excess of the amount mentioned in the waiver, the taxpayer had the right to take the case to the Board of Tax Appeals or to pay the tax and bring suit to recover in whole or in part.

And in the *Cleveland Ry. Co.* case, *supra,* the Sixth Circuit, after stating the purpose of Section 272(d), commented (pp. 659–660):

> In such cases the section offers a substantial inducement to the taxpayer to execute the waiver. If a waiver is of no avail until after final determination, there is little or no inducement to waive. It may be that in cases a small amount of interest might be saved if the Commissioner delayed more than 30 days in making the assessment, but this is of little consequence, since after final determination there is no oc-

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instant case (R. 14) and in *Payson* v. *Commissioner*, *supra*, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax". The Form 874 waivers involved in *Moore* v. *Cleveland Ry. Co.*, *supra*, and *Associated Mutuals* v. *Delaney*, *supra*, captioned "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" are in material respects the same as the Form 870 involved in the instant case.

casion for delay. The final audit having been made, assessment and notice are but routine ministerial acts requiring no time for study or deliberation.

In the instant case the Government brought suit to collect a deficiency in income tax, relying upon a waiver of the restrictions on the assessment and collection of a specified deficiency. Referring to its former decisions in *Mutual Lumber Co.* v. *Poe, supra,* and *McCarthy Co.* v. *Commissioner, supra,* the court below held (R. 68) that if, as decided in those cases, such a waiver was invalid because it was a premature waiver of right to go to the Tax Court, which a taxpayer does not have until a formal notice of deficiency is mailed, it was invalid for any purpose, and did not relieve the Commissioner from the statutory requirement of mailing a notice of deficiency prior to commencing this suit.

The unqualified terms of Section 272(d) provide, however, the right to waive the restrictions of Section 272(a), without limitation. And Section 272(a) restricts the assessment and collection of a deficiency prior to the mailing of a notice of the deficiency which the Commissioner is authorized to send to a taxpayer. The taxpayer's right to insist upon this restriction is clearly a right which may be waived, and has, in fact, been waived here. It is a right which a taxpayer has from the beginning and is independent of his right to go to the Tax Court if the Commissioner issues a deficiency notice for a larger amount than that specified in the waiver. As previously stated, the waiver here is, from the taxpay-

er's viewpoint, desirable because it effectively stops the accrual of interest. It is a right which a taxpayer has which does not require any agreement or consent on the part of the Commissioner. Surely there should not be imputed to Congress the intention to permit a taxpayer by unilateral action, which he can take "at any time", to stop the accrual of interest and yet not be bound by the waiver of restrictions upon the assessment and collection of the deficiency. The essential restriction imposed by Section 272(a) is that the Commissioner cannot assess and collect until the expiration of the period provided following the mailing of a deficiency notice. It is not reasonable to attribute to Congress an unexpressed purpose limiting the scope of Section 272(d). As the First Circuit pointed out in *Associated Mutuals* v. *Delaney, supra,* p. 183, if such had been the legislative purpose, it is reasonable to suppose that Congress would have specifically imposed upon the Commissioner the duty to send a deficiency letter, as it was careful to do in the analogous situation of a jeopardy assessment under Section 273 (a) and (b) of the 1939 Code.

The *Mutual Lumber Co.* and *McCarthy* cases involved situations different from that here. In those cases the question was whether the filing of a Form 870 waiver prevented the Commissioner from mailing a formal notice of deficiency and thus extending the period of limitation within which a deficiency in tax could be assessed and collected. It is to be noted that in both cases the waiver was captioned "Waiver of Right to File a Petition with the United States Board of Tax Appeals" and that by the language contained

therein the respective taxpayers expressly waived the right to file a petition with the Board and consented to the assessment and collection of deficiencies as set forth in reports of internal revenue agents.[18] In each case, the Ninth Circuit held that the provisional report of an internal revenue agent could not be made the basis of an appeal to the Board and that, in the absence of a determination of deficiency by the Commissioner, there was no right of appeal for a taxpayer to waive.[19] For this reason, the Ninth Circuit held that the "purported" waiver filed with the Commissioner before he had found any deficiency was "premature", and "powerless to prevent the Commissioner's resort to a letter of deficiency, by which the running of the statute was suspended." *Mutual Lumber Co.* v. *Poe, supra,* p. 907; *McCarthy Co.* v. *Commissioner, supra,* p. 621. It does not follow that, as held in the instant case (R. 68), the waiver was "invalid for any purpose" and that it did not relieve the Commissioner of the statutory re-

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[18] As appears from the opinion of the Ninth Circuit in the first appeal in *Mutual Lumber Co.* v. *Poe*, 44 F. 2d 922, 923, a note at the bottom of the waiver recited that it did not extend the statute of limitations for refund or assessment of tax; that it was not a final closing agreement; but that its execution and filing at the address shown in an accompanying letter "will expedite the adjustment of your income tax liability as indicated above." Apparently the Commissioner was reluctant to rely upon that waiver as authority to assess and collect the deficiency within the period agreed upon, without the issuance of a formal notice of deficiency, because of doubt as to the regularity of its filing. (44 F. 2d, pp. 923–924.) And see also the opinion of the District Court in that case upon the second trial (57 F. 2d 305, 307–309).

[19] Cf. *Moore* v. *Cleveland Ry. Co.*, *supra*, p. 659.

quirement of mailing a deficiency notice prior to commencing this suit. If waivers so filed are invalid for any purpose, they would be ineffective to stop the accrual of interest, contrary to the holdings of the Court of Claims and the Sixth Circuit in *Roos* v. *United States, supra,* and *Moore* v. *Cleveland Ry. Co., supra.*[20] On the other hand, if valid for such purpose, it is only logical to conclude that the benefit to the taxpayer in this respect is conditioned upon his waiver of the restriction upon the assessment and collection of the deficiency, and that it dispenses with the requirement that the Commissioner issue a formal deficiency notice and precludes appeal to the Tax Court unless the Commissioner should increase the deficiency over and above the deficiency to which the waiver of the taxpayer was directed, as was the situation in the *Roos, Cleveland Ry. Co.* and *Payson* cases, *supra.*

We believe that the reasoning of the First Circuit in *Associated Mutuals* v. *Delaney, supra,* is persuasive and should be accepted here. There, the First Circuit held (176 F. 2d, p. 183) that a waiver, filed pursuant to Section 272(d), to the deficiency proposed by an internal revenue agent obviated the need for the Commissioner to send a formal deficiency notice and

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[20] It may be noted that the taxpayer herein filed no return for the year 1946 (R. 37), and hence there was no time limit on the assessment and collection of the tax (Section 276(a), Internal Revenue Code of 1939). If the waiver herein is invalid for "any purpose", it would not stop the running of interest 30 days after its filing, and hence interest is still running and collectible to the day of payment.

precluded appeal to the Tax Court.[21] The taxpayer there, having been served with notice and demand for payment of income and excess profits taxes, sought an injunction against the prosecution of any proceeding for the collection of taxes. Having audited the taxpayer's returns for certain years, the agent informed the taxpayer that he would report a deficiency for the year 1941, and would recommend that overpayments for other years be credited against this deficiency. At the agent's suggestion, the taxpayer executed a Treasury Department Form 874 which in material part is the same as the Form 870 executed by the taxpayer herein. Thereafter, notice and demand for the 1941 deficiency listed in the waiver was sent to the taxpayer without any formal notice of the determination of a deficiency having previously been mailed to it under section 272(a). The taxpayer contended that the waiver of the restrictions on the assessment and collection of the proposed deficiency was ineffective because it was filed before a formal notice of deficiency under Section 272(a) was sent. While the court found no help in the legislative history of Section 272(d) (see pp. 10–17, *supra*) it reasoned (1) that the contention of the taxpayer, that the waiver of the restrictions on the assessment and collection of the proposed deficiency was ineffective because it was filed before a formal notice of deficiency under Section 272(a) was sent, was refuted by the language of Sec-

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[21] Indeed, the Court of Claims holds that a waiver of the right to appeal to the Tax Court may be filed entirely apart from the provisions of Section 272(d). *Roos* v. *United States*, *supra*, p. 150.

tion 272(d) which gives a taxpayer the right to submit a waiver "at any time" (p. 182); (2) that the wording of the waiver in Form 874 was absolute, not conditional (p. 181); (3) that under the plain language of Section 272(d), and by reference back to Section 272(a), the first of the restrictions which the taxpayer was given the right to waive was the mailing to it of a notice of deficiency (p. 182); and (4) that, in the face of repeated reenactments of the statute, the "long-standing administrative practice" not to send deficiency notices if a waiver had already been filed by the taxpayer was persuasive of legislative approval of that practice (p. 183).[22]

It may be noted that the Ninth Circuit reached a similar conclusion in its relatively recent decision in *Monge* v. *Smyth*, 229 F. 2d 361, certiorari denied, 351 U.S. 976, but refused to recognize it as controlling its decision in the instant case. There, a taxpayer sought to enjoin the collection of taxes on the ground, *inter alia*, that the Form 870–TS waiver which it had executed was invalid without determination of a deficiency and issuance of a statutory notice as provided in Section 272(a). In answer, the Ninth Circuit pointed out (p. 367) that the exception contained in Section 272(a) to the prohibition of Section 3653(a), enjoining the assessment and collection of taxes, applied only when the notice of deficiency has not been mailed.

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[22] See also *Diamond Alkali Co.* v. *Driscoll* (W.D. Pa.), decided June 13, 1940 (1940 C.C.H., par. 9526), and *Randall* v. *Riddell* (S.D. Cal.), decided February 7, 1952 (1952 C.C.H., par. 9207).

It added (p. 367) "But the notice may be waived", citing Section 272(d) as authority, and further stated that it follows that if a taxpayer signs such waiver he may not enjoin the Collector from proceeding in accordance with the waiver agreement, to collect the agreed tax. Referring to the fact that Section 272(d) affords to the taxpayer the right to submit a waiver "at any time", and that the benefit to it is the stopping of interest 30 days after filing, the Ninth Circuit stated (p. 368) that a waiver to a proposed deficiency allows the Commissioner to assess and collect the tax without sending the taxpayer a deficiency letter which can be used as a basis for a petition to the Tax Court. Accordingly, the court concluded that the execution and acceptance of the waiver (Form 870–TS) precluded the necessity of making a formal deficiency determination or a formal jeopardy assessment.

Although it is true, as the Ninth Circuit explained in the instant case (R. 69) and as shown by the last paragraph of its opinion in the *Monge* case (229 F. 2d, at 368), that a deficiency notice had been sent to the taxpayer therein; that the distraint proceedings sought to be enjoined had not been commenced until more than ninety days thereafter; and consequently that the exception to Section 3653, on which the taxpayer there relied, had no application—with the result that dismissal of that taxpayer's suit for lack of jurisdiction was properly affirmed for that reason—the views of the Ninth Circuit in the *Monge* case concerning the validity of a waiver appear equally applicable to the facts of the instant case, even though

those views constituted "dictum" (R. 69). Speaking of the *Monge* case, the court below said (R. 69) that if the waiver form (870–TS) signed in that case was the legal equivalent of the form filed in the *Mutual Lumber Co.* and *McCarthy* cases (and the instant case), the *Monge* case "unquestionably announces a rule contrary to that stated in the earlier decisions." The only material differences between the two forms are that a Form 870–TS requires acceptance by the Commissioner before it becomes operative, and once accepted prevents the Commissioner from claiming any further deficiencies for the tax years involved in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations.[23] Those differences appear to be of no significance here.

The only purpose of a deficiency notice is to apprise a taxpayer of the nature and amount of a tax deficiency determined by the Commissioner in order to afford the taxpayer an opportunity to contest it, prior to payment, before the Tax Court.[24] But if a taxpayer has already been informed of the nature and amount of the deficiency by an internal revenue

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[23] See *Monge* v. *Smyth*, *supra*, pp. 367–368; *United States* v. *Goldstein*, 189 F. 2d 752 (C.A. 1st); 9 Mertens, Law of Federal Income Taxation (1956 Cum. Supp.), Section 49.99, pp. 79–80, fn. 53.

[24] *Commissioner* v. *Forest Glen Creamery Co.*, 98 F. 2d 968, 971 (C.A. 7th); *Commissioner* v. *Stewart*, 186 F. 2d 239, 241 (C.A. 6th); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d); *United States* v. *Curd*, 257 F. 2d 347, 350 (C.A. 5th), certiorari denied, 358 U.S. 920; *General Outdoor Advertising Co.* v. *United States*, 169 F. Supp. 947, 950 (C. Cls.).

agent,[25] and files a waiver pursuant to the provisions of Section 272(d), the effect of which is to stop the accrual of interest on the 30th day after filing or on the date the deficiency is assessed, whichever is the earlier, it seems clear that taxpayer has thereby consented to the immediate assessment and collection of the deficiency and has waived the restriction of Section 272(a) requiring the Commissioner to first mail a formal notice of deficiency.

We submit, therefore, that the First Circuit was correct in its holding in *Associated Mutuals* v. *Delaney, supra,* and that the court below erred in failing to hold that there is no necessity for issuing a formal 90-day deficiency notice where, as in this case, the taxpayer has filed a waiver consenting to the immediate assessment and collection of the deficiency.

CONCLUSIONS

For the reasons stated, the judgment should be reversed.

Respectfully submitted.

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AUGUST 1959.

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[25] As is evidenced by the waiver filed on August 18, 1949 (R. 14), prior to the assessment of the tax, the taxpayer herein had notice of the proposed deficiency for the taxable year 1946 in the amount of $9,965.48, and had no objection thereto (R. 39).

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 48

UNITED STATES OF AMERICA, PETITIONER

v.

SYDELLE PRICE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR SYDELLE PRICE

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OPINIONS BELOW

The District Court did not write an opinion. Instead it made findings of fact and conclusions of law. (R. 25.) The opinion of the Court of Appeals (R. 65-71) is reported at 263 F. 2d 382.

QUESTION PRESENTED

The question presented is whether, under the language of subsections (a) and (d) of Section 272 of the 1939 Internal Revenue Code, the execution by a taxpayer of a U. S. Treasury Form

870 (as distinguished from a U. S. Treasury Form 870-TS), prior to the issuance of a notice of deficiency by the Commissioner of Internal Revenue, relieves the Commissioner of the restrictions imposed upon him by subsection (a) of Section 272. Stated in another fashion, the question is whether a taxpayer under the provisions of subsections (a) and (d) of Section 272 may validly waive his rights to appeal to the Tax Court of the United States before he has received from the Commissioner the written notice of deficiency which is a pre-requisite to an appeal.

SUMMARY OF ARGUMENT

Section 272, Internal Revenue Code of 1939, is derived from Section 274 of the Revenue Act of 1924, 43 Stat. 253, C. 234. When Section 274 of the 1924 Revenue Act was enacted, its purpose was to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals. That is, Section 274 of the 1924 Revenue Act created the sole procedural steps by which the jurisdiction of the Board of Tax Appeals was invoked. Thus, Section 274(a) of the Revenue Act of 1924, and hence Section 272(a) of the 1939 Internal Revenue Code, each provided in the first sentence that *if* the Commissioner *determined* a deficiency in tax, a notice of *such deficiency* was to be sent to the taxpayer. The second sentence then stated that the taxpayer could, within ninety days after such notice of deficiency was mailed, appeal to the Board of Tax Appeals for a *redetermination* of the deficiency.

But what if the Commissioner did not send such a notice of deficiency? The third sentence of Section 272(a), Internal Revenue Code of 1939, created restrictions against assessment or a proceeding in court for the collection until such notice of deficiency was mailed to the taxpayer and ninety days had elapsed without the filing of a petition in the Tax Court. However, these prohibitions created a problem for the taxpayer who did not wish to file a petition in the Tax Court within the ninety days, but who desired that the interest stop running on the deficiency.

Therefore, in order to give the taxpayer the right to stop the

running of interest for the period of time from the date the notice of deficiency was sent until the ninety days had elapsed, subsection (d) of Section 272 provided that the taxpayer at any time had the right to waive the restrictions of subsection (a) on the assessment and collection of the whole or any part of "the deficiency." This meant that "the deficiency" had to be determined and a notice thereof issued to the taxpayer before any restrictions could be waived. The reason was that the phrase "the deficiency" qualified the preceding words "at any time" found in subsection (a) because a reference back to subsection (a) reflects that "the deficiency" means a deficiency that has been determined and notice thereof issued. Thus, no waiver can be valid under subsection (d) until the deficiency has been determined and notice of such deficiency sent to the taxpayer.

Furthermore, such an interpretation squares with the intent of the Congress when the waiver subsection first became law. The Senate Finance Committee report of 1926 stated that such waivers gave the taxpayer the right to waive in writing the restrictions "on the Commissioner against assessing and collecting the tax, but without taking away the right of the taxpayer to take the case to the board." Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 Cum. Bull. (Part 2) 332, 352). Since a notice of deficiency is a prerequisite to an appeal to the Board of Tax Appeals, it must follow that such a waiver cannot be valid unless a notice of deficiency was sent before the execution of such waiver.

In short, a taxpayer cannot waive his right to appeal to the Tax Court until he has obtained that right via a notice of deficiency. At that time he may waive the restrictions on the Commissioner against assessing and collecting the deficiency.

ARGUMENT

The taxable year involved is 1946. The U. S. Treasury Form 870 executed by respondent was filed in 1949. Therefore, the Internal Revenue Code of 1939 is controlling. Specifically, it is subsections (a) and (d) of Section 272 which must be interpreted. Since these two subsections are related to each other structurally and because § 272(d) contains an express reference to § 272(a),

it follows that these two subsections should be read and interpreted in conjunction with each other rather than each by itself. Turning to the statutory language, the following is found:

"Sec. 272 Procedure in General.

(a) (1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 652, 59 Stat. 669] Petition to the Tax Court of the United States.—*If* in the case of any taxpayer, *the Commissioner determines that there is a deficiency* in respect of the tax imposed by this chapter, the Commissioner is authorized to send *notice of such deficiency* to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or *proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer*, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

(d) Waiver of Restrictions — The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiency*." (Italics supplied).

Whether the above language supports the view that a taxpayer may waive his right to appeal to the Tax Court before he has obtained that right via the notice of deficiency is the issue here. This is so because the Court of Appeals, sitting en banc, held that the statutory notice is a prerequisite to the filing of a valid waiver under Section 272(d). Also, the United States has agreed, at page 2 of its brief, that this is the issue by saying:

"Stated otherwise, may a taxpayer waive in advance the issuance of a 90-day letter?"

In order to answer this question, it is necessary to examine the

legislative history of Section 272(a) and (d), read the statutory language carefully, and analyze the reasoning of the case law in point before replying to petitioner's contentions.

I

The Legislative History of Section 272(a) and (d), Internal Revenue Code of 1939

Section 272(a) of the Internal Revenue Code of 1939 is the direct descendant of Section 274 of the Revenue Act of 1924,[1] 43 Stat. 253, C. 234, which was added to the law in 1924 to sup-

1. "Sec. 274(a): If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b): If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to date of judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c): If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector.

(d): If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay such deficiency shall be assessed immediately and notice and demand shall be made by the collector for the payment thereof. In such case the assessment may be made (1) without giving the notice provided in subdivision (a) of this section, or (2) before expiration of the 60-day period provided in subdivision (a) of this section even though such notice has been given, or (3) at any time prior to the final decision by the Board upon such deficiency even though the taxpayer has filed an appeal. If the taxpayer does not file a claim in abatement as provided in section 279 the deficiency so assessed (or if the claim so filed covers only a part of the deficiency, then the amount not covered by the claim) shall be paid upon notice and demand from the collector.

plement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals. This is evidenced by the Ways and Means Committee report which stated:[2]

"Section 274(a): This subdivision provides for *notice and an opportunity* for an appeal to the Board of Tax Appeals (a

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(e): If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in subdivision (d) of this section, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(f): Interest upon the amount determined as deficiency, or, if the tax is paid in installments, upon the part of the deficiency prorated to each installment, shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax, or the payment of such installment, to the date the deficiency is assessed.

(g) (1): Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(g) (2): In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period."

[2] H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258.)

body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." (Italics supplied)

That is, Section 274 of the Revenue Act of 1924 established the sole procedural steps by which a taxpayer could invoke the jurisdiction of the Tax Court. A reading of Section 274 of the Revenue Act of 1924[3] and the above quoted Ways and Means Committee language shows that the notice *and* an opportunity for appeal was to be given taxpayers "in cases where the Commissioner determined that there is a deficiency."

But what about the problem of interest charges running after the notice of deficiency was issued? Subsection (c) of Section 274 of the Revenue Act of 1924[4] provided that if the taxpayer did not file an appeal within the 60-day period, the deficiency could then be assessed. This meant that the Commissioner could not assess the "deficiency of which the taxpayer has been notified"[5] until after a notice had been issued and the 60-day period had elapsed. Consequently, since interest was charged from the date prescribed for payment of the tax until the date of assessment of the deficiency, a taxpayer was required to pay an additional 60 days of interest even if he decided not to file an appeal with the Board of Tax Appeals after receiving the notice of deficiency required by subsection (b) of Section 274 of the Revenue Act of 1924. Thus, the stage was set for a waiver provision.

In 1926, Congress adopted the first waiver provision in the form of Section 274(d) of the Revenue Act of 1926[6], and said in explanation thereof, speaking through the Senate Finance Committee:[7]

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[3] See footnote 1 for text.

[4] See footnote 1 for text.

[5] Section 274 (c), Revenue Act of 1924.

[6] "The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency." Section 274(d), Revenue Act of 1926, 44 Stat. 9, C. 27.

[7] Sen. Rep. No. 52, 69th Cong., 1st Sess., p. 27 (1939-1 (Part 2) Cum. Bull. 332, 352).

"The law provides that where a deficiency is assessed there shall be assessed at the same time interest at the rate of 6 per cent from the time the deficiency should have been paid to the date of assessment. In order to permit the taxpayer to pay the tax and stop the running of interest, the committee recommends in Section 274(d) of the bill that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax, *but without taking away the right of the taxpayer to take the case to the Board.* It is provided that in such cases that the 6 per cent interest stops running on the thirtieth day after the filing of such waiver unless assessment is made before such time." (Italics supplied)

In other words, the waiver provision was never intended to do more than allow the taxpayer the right to avoid the running of interest after he had received a notice of deficiency. This is so because a taxpayer could only appeal to the Board of Tax Appeals after he had received a notice of deficiency from the Commissioner. Therefore, when the Finance Committee stated that subsection (d) does not take away the right of the taxpayer to take the case to the Board, it must be concluded that the waivers contemplated were those which came into existence only after a notice of deficiency was issued.

Stated otherwise, Section 274(d), Revenue Act of 1926, granted a right to the taxpayer without taking away his right to take the case to the Board of Tax Appeals. He was given the right to stop the running of interest after receiving a notice of deficiency, and was not required to waive his right to appeal to the Board of Tax Appeals in exchange therefor. The subsection was never designed to relieve the Commissioner of the requirement that he *determine* a deficiency and issue a notice thereof.

In view of the above quoted explanation by the Senate Finance Committee of the meaning of Section 274(d) of the Revenue Act of 1926, it was not surprising that the Ninth Circuit held in the 1933 case of *Mutual Lumber Co. v. Poe*, 66 F. 2d 904 (C. A. 9th, 1933), certiorari denied, 290 U.S. 706, that waivers filed before the issuance of a notice of deficiency were premature and therefore invalid, and said, at pages 906 and 907:

"Section 274(a), supra, (26 USCA 1048), contains the initial and important condition, 'if in the case of any taxpayer, the Commissioner determines that there is deficiency in respect of the tax imposed by this chapter,' etc. This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section.

" . . . If there is no *determination* of a deficiency by the Commissioner, there is no right of appeal to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal." (Italics supplied)

Nor was it unexpected that the *Mutual Lumber Co. v. Poe* case, *supra*, was reaffirmed and followed by the Ninth Circuit in the 1935 decision of *McCarthy Co. v. Commissioner*, 80 F. 2d 618 (C. A. 9th, 1935), certiorari denied, 298 U.S. 655, wherein Judge Garrecht said, at page 621:

"It has already been decided by this Court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, is premature and therefore invalid. In Mutual Lumber Co. v. Poe, 66 F. 2d 904, 906, certiorari denied, 290 U.S. 706, the late Judge Sawtelle said . . . "

Following the *Mutual Lumber Co.* and *McCarthy Co.* cases, *supra,* and because these were the only cases interpreting Section 274(d), Revenue Act of 1926, the question of the validity of waivers filed before issuance of a notice of deficiency was raised in 1938 by a Subcommittee of the Committee on Ways and Means. The report[8] issued by this Subcommittee stated:

"As a result of two decisions of the Circuit Court of Appeals for the Ninth Circuit (Mutual Lumber Co. v. Poe, 66 F. 2d 906, certiorari denied Jan. 6, 1936; McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied April 6, 1936), a valid waiver cannot be given by a taxpayer prior to the formal determination of the Commissioner, as evidenced by a 60 or 90 day letter that there is a deficiency in tax."

Consequently, the subcommittee recommended an amendment to

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[8] Report of Subcommittee of the Committee on Ways and Means, 75th Cong., 3rd Sess., p. 53, on Proposed Revisions of the Revenue Laws, 1938.

what was then Section 272(d) (successor to Section 274(d), Revenue Act of 1926):

> "... to insure the validity of waivers given before the mailing of the deficiency letter providing that the taxpayer shall have the right, at any time after a deficiency is *proposed* in any manner that the Commissioner may direct, whether before or after sending of the notice of deficiency, as provided in subsection (a), to waive by a signed notice in writing, any and all restrictions or conditions however imposed on the immediate assessment and collection of the whole or any part of the deficiency so proposed." (Italics supplied)

However, this amendment was *not* adopted by the Ways and Means Committee and the language of Section 272(d) (successor to Section 274(d), Revenue Act of 1926) remained exactly as it was when the Senate Finance Committee Report of 1926[9] first introduced the subsection to the law as a measure whereby interest could be stopped, *"but without taking away the right of the taxpayer to take the case to the Board."*

Therefore, on September 23, 1941, the Commissioner of Internal Revenue sought corrective legislation by publishing a Proposed Internal Revenue Administrative Code.[10] In the proposed code, which the Commissioner said would eventually be submitted to Congress, Section 2604 would have granted the taxpayer the right to waive the restrictions "at any time after the date prescribed for filing the return."[11] This proposed statutory language was designed to overcome the *Mutual Lumber Co. v. Poe* and *McCarthy Co. v. Commissioner* cases, *supra*, which held that waivers to be valid under Section 272(d) of the 1939 Internal Revenue Code must be preceded by the issuance of a statutory notice of deficiency.[12]

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[9] Sen. Rep. No. 52, 69th Con., 1st Sess., p. 27 (1939-1 (Part 2) Cum. Bull. 332, 352).

[10] Letter of Commissioner of Internal Revenue, 1941-2 Cum. Bull. 368.

[11] Harriet Geary, The Proposed Internal Revenue Administrative Code, 20 Taxes 390 at 398 (1942); See footnote at 9 Mertens, Law of Federal Income Taxation, § 49.99, p. 87 (1943).

[12] *Ibid.*

However, like the 1938 proposed amendment, Section 2604 never became a part of income tax law until 1954 when Congress finally *changed* the language of Section 272(d). Thus, Section 6213(d) of the 1954 Internal Revenue Code added the following italicized words to what had previously been Section 272(d) of the 1939 Internal Revenue Code:

> "Sec. 6213(d) Waiver of Restrictions — The taxpayer shall at any time (*whether or not a notice of deficiency has been issued*) have the right, by a signed notice in writing filed with the Secretary or his delegate, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency." (Italics supplied)

In view of the above history of Section 272(d) of the 1939 Internal Revenue Code, it is submitted that the cases of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* correctly interpreted that subsection to mean that waivers filed before the Commissioner issued a notice of deficiency were premature and invalid. Surely this is the only interpretation which squares with the intention of Congress when it first placed the applicable language in a revenue act and said that such language did not take away the right of the taxpayer to appeal to the Board of Tax Appeals. Congress took no steps to change the language of Section 272(d) of the 1939 Internal Revenue Code until 1954, even though it had been told in 1938 by a Subcommittee of the Ways and Means Committee that the Ninth Circuit had held such waivers invalid, and it had seen the change proposed in Section 2604 of the Internal Revenue Administrative Code offered by the Commissioner of Internal Revenue in 1941. Then when Congress finally did alter the substance of Section 272(d) of the Internal Revenue Code, it added the phrase "whether or not a notice of deficiency has been issued." Taxpayer submits that this failure of Congress to act, after notice, for nearly 20 years, coupled with the changed language of Section 6213(d) of the 1954 Internal Revenue Code, is strong support for the conclusion that Section 272(d) of the 1939 Internal Revenue Code meant exactly what the Ninth Circuit said it meant in the *Mutual Lum-*

ber Co. and *McCarthy Co.* cases, *supra.* Also, when this later legislative history is considered in the light of the language of the Senate Finance Committee report which first introduced the same statutory language found in Section 272(d) of the 1939 Internal Revenue Code, it is difficult to see how one could support a contention that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* should be overturned unless those cases holding contra (*Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C. A. 6th, 1940) and *Associated Mutuals, Inc. v. Delaney*, 176 F. 2d 179 (C.A. 1st, 1949)) are based on statutory language which clearly and unambiguously requires such a decision.

II

The Language of Subsections (a) and (d) of Section 272, Internal Revenue Code of 1939

When the phrasing of both subsections (a) and (d) is examined, certain factors are noted.

First, subsection (d) permits the taxpayer to waive "at any time" certain restrictions set forth in subsection (a). But what are these restrictions? Subsection (d) says they are the "restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiency.*" Therefore, the question arises as to the meaning of the words "the deficiency." Surely these words mean the same as do the same words found in the second sentence of subsection (a). Since a reading of the second sentence shows that "the deficiency" used therein refers to the first sentence of subsection (a), it follows that the answer must be found in the first sentence. Turning to the first sentence it is seen that the phrase "If . . . the Commissioner *determines* that there is a deficiency . . . " is followed by the phrase " . . . the Commissioner is authorized to send *notice of such deficiency.*" This language reflects that "the deficiency" refers to a deficiency which has been determined. That is, the taxpayer may waive the restrictions on the assessment and collection of a deficiency which has been determined. This means that a notice of deficiency must have been issued before there could be a waiver.

Furthermore, such an interpretation conforms and fits the purpose of subsection (a) which was to establish the procedural route by which a taxpayer invoked the jurisdiction of the Tax Court. It would seem rather odd to find that the words "the deficiency" do not refer to a deficiency which has been determined when subsection (d) expressly refers to the "restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of *the deficiancy.*" This is particularly so when it is remembered that subsection (a) does not concern itself with the problems of assessment and collection but rather with creating the method (notice of deficiency) by which a taxpayer could appeal to the Tax Court.

Consequently, when Judge Sawtelle stated in *Mutual Lumber Co. v. Poe, supra,* that the phrase "If . . . the Commissioner determines that there is a deficiency . . . "qualifies subsection (d), he was reading the statute in a manner which was consonant with the rules of grammatical construction. Also, his interpretation acknowledges that subsections (a) and (d) are related to each other as part of the same section and cannot be read separately. Thus, unless the cases contra to *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are based on better reasoning or a more careful analysis or more scholarly research, the Ninth Circuit should be upheld.

III

The Applicable Case Law

Although there are several methods of arranging the pertinent cases for purposes of analyzing them, taxpayer submits that a chronological review will be workable here.

Mutual Lumber Co. v. Poe

The first case involving the validity of a waiver under subsection (d) of Section 274 of the Revenue Act of 1926 arose in the Ninth Circuit in 1933 and was styled *Mutual Lumber Co. v. Poe, supra.* Since subsection (d) was the original waiver provision, it is interesting to note at page 905 of the decision that the U. S. Treasury Form 870 submitted to the Mutual Lumber Co. was entitled:

"Waiver of Right to File a Petition with the United States Board of Tax Appeals"

Immediately thereafter the waiver form provided:

"The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and consents to the assessment and collection of a deficiency in tax for the year or years of 1920 and 1921 aggregating $28, 175.61, . . ."

In other words, the U. S Treasury itself recognized that the effect of its printed waiver form, if valid, was to destroy the taxpayer's right to appeal to the Board of Tax Appeals.

On December 1, 1926, the Commissioner wrote a letter to the Mutual Lumber Co. asking that it file consents extending from December 31, 1926, until December 31, 1927, the statute of limitations for the assessment of 1920 and 1921 taxes. On December 10, 1926, the taxpayer replied declining to execute such consents and advised the Commissioner that it had signed the Form 870, dated December 2, 1926, and had mailed it to the Commissioner who received it on December 11, 1926. Thereafter, on December 16, 1926, the Commissioner issued a 60-day notice of deficiency setting forth the asserted deficiencies for 1920 and 1921. The assessment of these deficiencies was made on March 5, 1927. Subsequently, on April 27, 1927, the Mutual Lumber Co. paid the deficiencies under protest. Later a refund action was instituted in the U. S. District Court against Mr. Poe, the Collector of Internal Revenue, for their recovery.

When the matter reached the U. S. Court of Appeals for the Ninth Circuit the second time, the issue was whether the running of the statute of limitations (December 31, 1926) was suspended by the mailing of the notice of deficiency on December 16, 1926, after the U S. Treasury Form 870 had been filed with the Commissioner. The Ninth Circuit, in deciding the matter stated at page 906:

"The question that we regard as determinitive of the instant case is whether or not the purported waiver of right to file an appeal, signed by the appellant was *valid*. If it was invalid,

necessarily the filing of the document could not affect the Commissioner's right to mail a deficiency letter and to derive the benefit of the consequent suspension of the statute of limitations." (Italics supplied)

That is, the Ninth Circuit, acknowledging that the issue was whether the statute of limitations for the assessment had run on March 5, 1927, nevertheless categorically stated that the answer depended upon whether the waiver form 870 was valid or not.

In deciding the case for the Collector of Internal Revenue, the Ninth Circuit held that the subject waiver was premature and therefore invalid. This meant, said the opinion, that the waiver was powerless to prevent the Commissioner's resort to a letter of deficiency by which the running of the statute was suspended. The reasoning is best expressed by the opinion itself at page 906:

"Section 274(a), supra, contains the initial and important condition —

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, etc.

This condition, set out at the very beginning of the section, assuredly qualifies all the other provisions contained in such section.

One of those provisions is subsection (d), upon which the appellant chiefly relies. Reading that subsection in the light of the foregoing condition specifically set forth in subsection (a), we are impelled to the conclusion that the taxpayer's 'right' 'to waive the restrictions provided in subdivision (a) of this section' is qualified by the condition specified in the very subsection (a) just referred to; namely, 'if in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect to the tax,' etc. If there is *no* determination of a deficiency by the Commissioner, there is no right of appeal for the taxpayer to waive; for the provisional report of an internal revenue agent cannot be made the basis of an appeal. This is clear from the terms of the subsection itself, which computes the time allowed for the filing of a petition with the Board of Tax Appeals, not from the mailing of an *agent's* report but from the mailing of the *Commissioner's* notice of deficiency."

In short, the Ninth Circuit sustained the United States in the col-

On the other hand, it must be recognized that the actual administrative practice did not support Judge Simons. In both the *Mutual Lumber Co.* and the *McCarthy Co.* cases, *supra*, and in *Moore v. Cleveland Ry. Co., supra*, itself, the Commissioner did not rely on the executed waiver form to assess and collect the tax. Rather a notice of deficiency was issued to the taxpayer in each case. Thus, to say or infer that the administrative practice of the Commissioner supports the validity of such waivers is to offer a statement or inference which is without support.

2. The History of Section 272(d)

Insofar as Judge Simons' reliance on the history of Section 272(d) is concerned, it is necessary to point out that he did not cite or mention the 1926 Senate Finance Committee's report, *supra*, p. 10, which made the flat statement that the waiver subsection (Section 274(d), Revenue Act of 1926) permitted a waiver, "but without taking away the right of the taxpayer to take the case to the Board." Consequently, the opinion did not deal with the problem of how a taxpayer could still have the right to appeal to the Board of Tax Appeals unless a notice of deficiency was issued prior to the filing of a waiver.

Furthermore, the strength of Judge Simons' historical supports should be evaluated in the light of his statements about the failure of Congress to amend subsection (d) of Section 272 in 1938 even though a committee report recommended an amendment because of *Mutual Lumber Co. v. Poe, supra*, and *McCarthy Co. v. Commissioner, supra*, which invalidated such waivers. His opinion stated, at page 660:

> "It is true that no such amendment has yet been adopted by the Congress. The report from which we quote, however, was made on January 14, 1938, and the grave concerns, domestic and international, which since that date have engrossed the Congress, and of which we take judicial notice, permit no adverse inference to be drawn from such failure, as appears to have been drawn in East Bay Water Co. v. McLaughlin, supra."

The taxpayer submits that the problems, both domestic and inter-

lection of $28,175.61 in deficiencies by holding that a waiver to be valid under subsection (d) of Section 274, Revenue Act of 1926, must be preceded by a determination of a deficiency in the form of a notice of deficiency.

McCarthy Co. v. Commissioner

In 1935 there arose the second case concerning the validity of a U. S. Treasury Form 870. The case, *McCarthy Co. v. Commissioner, supra,* raised, as did *Mutual Lumber Co v. Poe, supra,* the question of whether the statute of limitations, which would normally have run on December 31, 1929, was extended by the issuance of a notice of deficiency on December 27, 1929. The taxpayer argued that since it had filed on October 27, 1929, a waiver of right to file a petition in the Board of Tax Appeals and consented to assessment and collection, the statute of limitations prevented assessment after December 31, 1929. That is, the taxpayer again argued that the notice of deficiency of December 27, 1929, was a "useless act" because of the previously filed U. S. Treasury waiver form, and could not suspend the running of the statute of limitations on assessment and collection.

Judge Garrecht, in disposing of this contention, reaffirmed the holding of *Mutual Lumber Co. v. Poe, supra,* respecting the validity of a waiver filed under subsection (d) of section 274, Revenue Act of 1926, holding at page 621 that:

> "It has already been decided by this court that a waiver or consent of that kind, filed before the Commissioner has sent a notice of deficiency, is *premature* and therefore *invalid.* In *Mutual Lumber Co. v. Poe*, 66 F. (2d) 904, certiorari denied 290 U. S. 706, the late Judge Sawtelle said. . ." (Italics supplied)

Thus, for the second time in two years the United States collected additional taxes which would have been barred had the waiver (U S. Treasury Form 870) been valid when executed before issuance of a notice of deficiency. In this instance it was an additional $12,784.78.

Furthermore, it is worth noting that in neither case did the United States rely on the validity of the waiver of the right to file a petition to the Board of Tax Appeals and consent to immediate assessment. Instead, notices of deficiency were issued, after the execution of the U. S. Treasury Form 870, to the Mutual Lumber Co. and the McCarthy Co. Also, it is important to remember that both waivers openly stated that they purported to waive the taxpayers right to appeal to the Board of Tax Appeals.

East Bay Water Co. v. McLaughlin

Three years after the decision in *McCarthy Co. v. Commissioner, supra,* the Government, in *East Bay Water Co. v. McLaughlin,* 24 F. Supp. 222, 228 (D.C.N.D. Cal., 1938), contended that "*any* waiver filed prior to the determination of an assessment by the Commissioner is premature and invalid." The reason the Government advanced this view was that it charged interest on $571,271.60 of asserted additional tax due for the period October 4, 1930, to June 24, 1931, even though the taxpayer had filed a waiver, purportedly within the meaning of subsection (d) of Section 272, Revenue Act of 1928, on September 4, 1930.

The District Court, citing both the *Mutual Lumber Co.* and the *McCarthy Co.* cases, *supra,* held that such waivers were premature and invalid if filed before a notice of deficiency had been issued. This meant that the Government, for the third time in five years, had collected either additional tax or interest over the dead body of its own Form 870. Also, the District Court felt compelled to note that although the problem created by the *Mutual Lumber Co.* and the *McCarthy Co.* decisions, *supra,* had been brought to the attention of a subcommittee of the Ways and Means Committee of the U. S. House of Representatives on January 14, 1938, no action had been taken by Congress.

This then was the situation or stage when the first decision contrary to the above cases made its appearance.

Moore v. Cleveland Ry. Co.

Seven years after the Ninth Circuit decided *Mutual Lumber Co. v. Poe, supra,* and five years after *McCarthy Co. v. Commis-*

sioner, supra, the first conflicting decision was handed down by the Sixth Circuit in *Moore v. Cleveland Ry. Co.*, 108 F. 2d 656 (C. A. 6th, 1940). All of the other contra decisions came later, and a reading of them will reveal that each rests upon, and cites as authority, *Moore v. Cleveland Ry. Co., supra.* Therefore, since the latter case is the fountain head of the view that waivers filed prior to issuance of a notice of deficiency are valid, it follows that to the extent that the Sixth Circuit's opinion in the *Moore* case, *supra,* is poorly reasoned or based upon inadequate research, all of the other decisions are severely weakened.

An analysis of the opinion in the *Moore* case, *supra,* reveals that Judge Simons at page 659 disregarded the Ninth Circuit's interpretation in *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* because, in his judgment, the Ninth Circuit's view took no account of "the phrasing of the Statute, the manifest purpose of § 272(d), its history, or administrative practice." Turning to each of these factors in reverse order, the following is noted:

1. Administrative Practice

The administrative practice referred to is not elaborated on further in Judge Simons' opinion. However, let it be assumed that it was the consistent practice of the Commissioner, prior to 1940, not to issue a statutory notice of deficiency, as required by Section 272 of the 1939 Internal Revenue Code and its predecessors, once a taxpayer signed a waiver form under the purported authority of Section 272(d), Internal Revenue Code of 1939. If this were the case, the Commissioner was engaging in such practice during a seven year period when the only court decisions interpreting Section 272(d) and its predecessors had held such waivers to be invalid. *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra.* How can administrative practice which violates the only reported court decisions as to the meaning of Section 272(d) support a contrary interpretation of Section 272(d) particularly in view of the failure of Congress to change Section 272(d) until 1954 or nearly sixteen years after it was told that existing case law required such a change?

national, which confronted the Congress in 1954 were equally grave, and yet action was taken not only to amend subsection (d) of Section 272 but to completely revise the entire Internal Revenue Code. Thus, it is extremely doubtful that inferences drawn from a failure to amend the law in 1938 can be avoided simply by taking judicial notice that the 1938 Congress had other problems. If so, no inference is ever justified respecting the failure of Congress to amend legislation since it always has other domestic and international problems. What the historical reasoning of the *Moore v. Cleveland Ry. Co., supra,* opinion says in effect is that while Congress did not change what it recognized was the law as interpreted by the only reported decisions, namely that waivers were invalid if signed before a deficiency notice was issued, nevertheless the legislative history shows that such waivers are valid.

Nor can taxpayer's inference be avoided, as the United States attempts at page 16 of its brief simply by observing that the 1938 proposed amendment was not adopted "(for reasons which are not apparent, the legislative history being barren on the matter)." After all, if the reasons were apparent, there would be no need to draw inferences. An inference cannot be escaped merely by pointing out that it is an infrence.

Therefore, it seems that the views of Judge Simons respecting the legislative history of subsection (d) of Section 272 are not such that they should be preferred over the review found in Part I hereof. Indeed the discussion of legislative history found in *Moore v. Cleveland Ry. Co., supra,* is merely a series of conclusions rather than a presentation of the relevant material from which one could evaluate the conclusions.

3. Manifest Purpose of Section 272(d)

Next the Sixth Circuit referred (as has the United States at page 10 of its brief) to the "manifest purpose" of subsection (d) of Section 272, saying, at page 659, that:

> "The purpose of § 272(d) is obviously to permit the taxpayer to settle his tax liability and the government to get its money without delay where no controversy remains between the taxpayer and the Commissioner. . ."

The taxpayer urges that a statutory purpose is not ascertained merely by labeling a preferred statement of purpose as "manifest" and following it with unsupported statements respecting the purpose of the statute. To begin with, the above-quoted language from *Moore v. Cleveland Ry. Co., supra,* is flatly contradicted by the previously quoted language of the 1926 Senate Finance Committee report, *supra,* p. 10, which stated that the purpose was to permit a taxpayer to pay the tax and stop the running of interest, "but without taking away the right of the taxpayer to take the case to the Board." Certainly it was not the intent of Congress in adopting Section 272(d) that the taxpayer's tax liability be settled if he was still to have the right to take the case to the Board. Rather it was simply to allow him to pay the alleged tax after issuance of a notice of deficiency and stop the running of interest. Furthermore, it has always been the law that the execution of a U. S. Treasury Form 870 does not settle a taxpayer's liability, and further deficiencies for the same year may be claimed by the Commissioner after execution of such waivers.[13] Thus the purpose of subsection (d) of Section 272 could not have been "to permit the taxpayer to settle his tax liability." Also, it is incorrect to say its purpose was to allow the Government to get its money. A taxpayer could always pay the asserted tax, prior to passage of Section 274(d), Revenue Act of 1926, but the taxpayer could not stop the running of interest because the tax could not be assessed.

Consequently, it is suggested that the "manifest" purpose of Section 272(d), as determined by *Moore v. Cleveland Ry. Co., supra,* is not what that opinion says it is.

4. The Phrasing of the Statute

Finally, *Moore v. Cleveland Ry. Co., supra,* relied on the phrasing of the statute as support for its refusal to follow *Mutual Lumber v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* saying at page 659:

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[13] *Botany Mills v. United States,* 278 U.S. 282; *Payson v. Commissioner,* 166 F. 2d 1008 (C.A. 2d, 1948).

". . . A deficiency is defined by § 271(a) as 'the amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return . . .' It would seem, therefore, that whenever the taxpayer has failed to make adequate return of income, there is a deficiency, notwithstanding lack of determination by the Commissioner or his agents. *True, it is, that before there has been ascertainment, a waiver is too indefinite to avail the taxpayer as a bar to interest, or the Commissioner in collection.* Once the deficiency has been *ascertained*, however, *even though but tentatively*, and there is waiver with respect to the amount so ascertained, no reason appears why to that extent the waiver is not valid so as to permit assessment and collection to go forward with dispatch. The restrictions waived are in the taxpayer's interest and, if satisfied with the preliminary determination, he may make an earlier settlement of his liability so as to avoid further interest. This seems to be the clear meaning of § 272(d) which recites that 'the taxpayer shall at any time have the right, etc.' If by that section the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so. While it is true that there may be no appeal from a determination until it is final, this is not the only restriction provided by §272(a). The waiver releases the Commissioner from obligation to wait 60 days after the mailing of the deficiency notice before making assessment or collection of the tax." (Italics supplied)

The above reasoning should be closely examined before this Court adopts it.

First, Section 272(a), which is the applicable section when interpreting Section 272(d), does not refer to "deficiency" as defined in Section 271(a), Internal Revenue Code of 1939. Instead it says:

"If the Commissioner determines that there is a deficiency . . ., the Commissioner is authorized to send notice of *such* deficiency to the taxpayer . . ."

Thereafter, Section 272(a) imposes restrictions against the Commissioner until he has issued such a "notice" of deficiency. Then Section 272(d) provides that "The taxpayer shall at any time have the right to waive those restrictions on the assessment and col-

lection of *the deficiency.*" Certainly the phrase "the deficiency" found in Section 272(d) can only refer to the deficiency "determined" by the Commissioner referred to in Section 272(a). If Section 272(d) permits waiver of the restrictions set forth against assessing and collecting the deficiency which restrictions are set forth in the third sentence of Section 272(a), surely the meaning of "deficiency" is not determined by referring to an entirely different section such as Judge Simons has done in turning to Section 271 (a). The words "the deficiency" found in Section 272(d), which were not quoted by Judge Simons, assuredly qualify the words "shall at any time" found in the initial portion of the sentence. Section 272(d) simply means, as the Ninth Circuit held, that a taxpayer may waive the restrictions imposed upon the Commissioner by Section 272(a) upon the collection or assessment of "the deficiency." However, that deficiency must be ascertained or determined before it can be waived.

Judge Simons says there can be a deficiency before one has been determined, but interest on such a "deficiency" cannot be waived. However, he goes on to say that once it has been ascertained, even tentatively, interest on a tentative deficiency can be waived. This, it is submitted, is threading the needle in rather fine fashion. How can there be "ascertainment" on a "tentative" basis?

Not only is "ascertainment" on a "tentaive" basis a contradiction in terms, but subsection (a) of Section 272 provides that the Commissioner must "determine a deficiency" and send a "notice of *such* deficiency" or certain restrictions will be imposed. The section does not mention ascertainment on a tentative basis. The preliminary report of a Revenue Agent is not a deficiency or a determination of a deficiency and a taxpayer cannot appeal to the Tax Court from such a provisional report. And if there can be no appeal without a notice of deficiency, how can waivers permitted by subsection (d) of Section 272 not take away the right to appeal to the Tax Court if there is no determination of a deficiency and no notice of a deficiency issued to the taxpayer before the waiver is considered valid? When subsection (d) of Section 272 permits a waiver of the restrictions against collection and assess-

ment of "the deficiency", it means what the Ninth Circuit Court said it means. There must be determination of a deficiency before a waiver is valid under subsection (d) of Section 272.

Finally, the Sixth Circuit said, at page 659:

> ". . . If by that section (272(d)) the Congress intended to grant the right to waive only after final determination, it would have been very easy for the Congress to have said so . . ."

This is exactly what Congress did say when the 1926 Senate Finance Committee's report, *supra*, p. 10, stated that the filing of such waivers did not take away the right of the taxpayer to appeal to the Board. Also, Congress made it clear in 1954 when Section 6213(d) added the phrase "whether or not a notice of deficiency has been issued."

From the foregoing, it is questionable whether *Moore v. Cleveland Ry. Co., supra,* contains either the analysis or legal authority to cause one to reject *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* regardless of how much inclination one might have to do so.

Roos v. U.S.

Within one month after the 1940 decision of *Moore v. Cleveland Ry. Co., supra,* the U. S. Court of Claims decided *Roos v.* U. S., 31 F. Supp. 144 (Ct. Cls., 1940). Here again, as in *Moore v. Cleveland Ry. Co.*, the Commissioner claimed interest, computed for a period beyond the thirty days after a U. S. Treasury Form 870 had been executed. Here the theory he advanced was that a waiver under subsection (d) of Section 274, Revenue Act of 1926, could not stop the running of interest unless it was filed after he (Commissioner of Internal Revenue) had made a final determination of the tax liability and mailed a notice of deficiency. The authority cited was *Standard Portland Cement Co. v. U.S.*, 80 F. 2d 585 (C. A. 3rd, 1935).

In deciding the issue against the United States, the Court of Claims wrote an opinion which sustains the taxpayer's position in the instant case.

After Louise Roos executed and filed a U. S. Treasury Form 870 entitled "Waiver of Right to File a Petition with the United States Board of Tax Appeals", the Commisisoner issued a notice of deficiency for an amount larger than that set forth in the Form 870. When the tax was assessed, the Commissioner charged the taxpayer interest for the period commencing thirty days after the filing of the U. S. Treasury Form 870 until the additional tax was assessed sometime after the notice of deficiency was issued. Turning to the Court of Claims for relief from this charge for interest, the taxpayer and United States were told by Judge Littleton that there was a difference between waiving one's right to petition the Board of Tax Appeals and agreeing to immediate assessment. The Court, after setting forth the 1926 Senate Finance Committee's report, *supra*, p. 10, stating that subsection (d) did not take away the right to appeal to the Board, said at page 149 that:

> "From what has been shown above we think it is clear that the execution of and the filing with the Commissioner by plaintiff of the signed notice in writing stopped the running of interest on the amount of $18,447.91 of the deficiency for 1927 thirty days after the filing of such notice, and that the notice was valid and effective *for that purpose,* notwithstanding the fact that it was filed prior to the date on which the Commissioner made his final determination with respect to plaintiff's tax liability for 1927 and mailed notice to plaintiff by registered mail disclosing the result of his determination." (Italics supplied)

In other words, Judge Littleton limited the validity of the waiver to the stopping of interest for the period commencing thirty days after the filing of the Form 870.

In explaining this restriction or limitation to the holding, the Court of Claims pointed out that while subsection (d) gave the right to waive "at any time" the restrictions on assessment and collection, it did not relieve the Commissioner from the duty to determine the deficiency and issue a notice of deficiency. This is reflected by the following language from the opinion at page 150:

". . . The fact that plaintff included in the notice a provision that she also waived the right to appeal to the Board of Tax Appeals from a determination by the Commissioner of a deficiency for that year, to the extent of $18,447.91, did not affect the validity or legality of the waiver. *Nor do we think the notice had the effect of changing or modifying any provision of the statute except* those provisions of section 274 to the effect that the Commissioner should withhold assessment and collection until 60 days after the deficiency notice had been mailed or, if an appeal was filed, until the decision of the Board became final . . ." (Italics supplied)

From this language, it is clear that the Court of Claims concluded that a determination and notice of deficiency must be issued whether the Form 870 was filed or not. Indeed the opinion goes on to state flatly at page 150 that:

". . . Provision for the filing of a written notice waiving the restrictions mentioned was never intended, as is shown by a consideration of other provisions of the statute, to affect *in any way the* right or *duty* of the Commissioner to proceed, as provided by the statute, *to determine* the correct tax liability for the taxable year involved *and to mail a notice to the taxpayer* setting forth the result of such determination. And, as shown by the report of the Senate Finance Committee quoted above, *it was never intended that a taxpayer* by waiving the restrictions on assessment and collection *should lose the right of appeal* to the Board of Tax Appeals. On the contrary, the committee specificially pointed out that the purpose of subdivision (d) was to permit the taxpayer to pay a deficiency in whole or in part *without losing the right of taking the case to the Board* of Tax Appeals *whenever the Commissioner should render his final determination . . .*" (Italics supplied)

That is, Judge Littleton, because a notice of deficiency had been issued after the execution of Form 870 in the case before him, did not deal with the validity of a Form 870 where the facts are that the Commissioner has never issued a notice of deficiency.

In short, would Judge Littleton or the Court of Claims, upon the basis of the above language, permit the Commissioner to

maintain, as was attempted in the District Court in this case, an action seeking final judgment for the amount set forth in the Form 870, where, as here, the taxpayer has never received a notice of deficiency or an opportunity to appeal to the Tax Court? Does not the language of the *Roos* opinion, *supra,* clearly show that a Form 870 cannot be used in such a manner by the Commissioner that the taxpayer loses his right to petition the Tax Court? Is it likely that the Court of Claims would hold that the execution of a Form 870 in 1949 authorizes an action seeking final judgment in 1956 when no notice of deficiency has ever been issued?

When the *Roos* opinion, *supra,* is analyzed, it cannot be said to support the proposition that Form 870's are valid, even for the purpose of allowing immediate assessment, where the record shows that no notice of deficiency has ever been issued. The most that can be said for the holding is that the execution of a Form 870 stops the running of interest thirty days after the filing thereof.

Diamond Alkali v. Driscoll

The third of the Government's cited case supports was *Diamond Alkali v. Driscoll,* W. D. Pa., decided June 13, 1940 (40-2 USTC ¶9526). The facts were that a Form 870, entitled "Waiver Of Right To File A Petition With The United States Board Of Tax Appeals" was filed in September of 1928. Thereafter, the Commissioner on June 10, 1930, *mailed a notice of deficiency* to Diamond Alkali. Subsequently, the determined deficiency was assessed, and, as in *Roos v. U.S., supra,* the Commissioner claimed interest on the additional tax set forth in the Form 870 for a period commencing 30 days after the filing of the waiver form.

Relying on *Roos v. U.S. supra,* and *Moore v. Cleveland Ry. Co., supra,* and pointing out that the Government had not appealed those decisions, and without an opinion, the District Court held

that a Form 870 was effective to *stop the running of interest* at a date not later than thirty days thereafter.

Associated Mutuals, Inc. v. Delaney

In *Associated Mutuals, Inc. v. Delaney*, 176 F. 2d 179, (C.A. 1st, 1949), the taxpayer executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" on a U. S. Treasury Form 874. However, unlike the facts in *Moore v. Cleveland Ry. Co., supra, Roos v. U.S., supra,* and *Diamond Alkali v. Driscoll, supra,* the Commissioner did not issue a notice of deficiency. It was contended by Associated Mutuals that the waiver was ineffective because it was filed before a notice of deficiency was issued.

Citing the *Moore, Roos,* and *Diamond Alkali* cases, *supra,* as authority and emphasizing the words "at any time" found in subsection (d) of Section 272, the Court held that such waivers eliminated the requirement that a notice of deficiency be issued and precluded appeal to the Tax Court. Since the previous material shows that the opinion in *Roos v. U.S., supra,* actually adopted a contrary view and the reasoning of *Moore v. Cleveland Ry. Co., supra,* is subject to serious infirmities, it is only necessary to examine the independent supports of the *Associated Mutuals* opinion, *supra.*

After citing the above three cases, the First Circuit said at page 182:

> "Furthermore, the right is given the taxpayer by § 272(d) to 'wave the restrictions provided in subsection (a) of this section on the assessment and collection' of *a deficiency;* and reference back to § 272(a) discloses that the first of these 'restrictions', or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency." (Italics supplied)

First, the Court is asked to note that the above quotation from

subsection (d) of Section 272 stops after the word "collection" and substitutes for the actual qualifying phrase "the deficiency" the words "a deficiency." Thus, when in the clause following the semi-colon the First Circuit makes a "reference back" to subsection (a) of Section 272 to ascertain the nature of the "restrictions", it avoids the necessity of also making a "reference back" to subsection (a) of Section 272 to ascertain the meaning of "the deficiency."

Secondly, is it a fair reading of subsection (a) of Section 272 to say that the Commissioner's duty to determine a deficiency and issue notice of "such deficiency" is a "restriction" on the assessment and collection of the whole or any part of the deficiency? It would seem more accurate to hold that it is the third sentence of § 272(d) which contains the restrictions which are applicable if the Commissioner does not perform his duty of determining a deficiency and issuing a notice of such deficiency. Actually the first and second sentences of Section 272(a) establish the method by which a taxpayer is given the right to appeal to the Tax Court. In fact that was the original purpose of Section 272(a) since it originally became a part of the law to supplement Section 900 of the Revenue Act of 1924 which created the Board of Tax Appeals.[14] Therefore, to say that provisions providing for notice and an opportunity for appeal to the Board of Tax Appeals are "restrictions" against the assessment and collection of "a deficiency" is to put the cart before the horse. After all it was the waiver provision (Section 272(d)) which was the afterthought rather than vice versa. Section 272 does not have as its primary purpose the establishment of a waiver provision by which the Commis-

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[14] "Section 274(a): This subdivision provides for *notice* and *an opportunity* for an appeal to the Board of Tax Appeals (a body provided for in Section 900 of the proposed Act), in cases in which the Commissioner *determined* that there is a deficiency." (Italics supplied) H.R. Rep. No. 179, 68th Cong., 1st Sess. (1939-1 (Part 2) Cum. Bull. 241, 258).

sioner is relieved of such duties as determining the deficiency and sending notice of such deficiency.

Consequently, when the First Circuit concluded that the duty to determine a deficiency and send notice of such deficiency was a "restriction" on the assessment and collection of *"a deficiency"*, it was not reading Section 272(d) or Section 272(a) correctly. In like fashion the First Circuit has, as demonstrated above, read Section 272(d) as though it did not contain the qualifying words "the deficiency", and has therefore not answered the question of how there can be a waiver of the restrictions on assessment and collection of the deficiency when none has been determined.

Following the above-quoted language, the First Circuit turned to the contention that the legislative history of Section 272 supports the view that waivers filed pursuant to Section 272(d) do not relieve the Commissioner of the duty of issuing a notice of deficiency thereby providing a basis for appeal to the Tax Court. In so doing, it set forth the language from the 1926 Senate Finance Committee's report, *supra*, p. 10, stating that the waiver provision did not take away "the right of the taxpayer to take the case to the Board."

In answer the opinion stated at page 183 that:

> "We have not discovered any subsequent legislative history which clarifies the *exact* meaning of this paragraph; . . ."

But what more is necessary? The meaning was perfectly clear to Judge Littleton who wrote the opinion in *Roos v. U.S., supra*, one of the cases cited by the United States as authority. Furthermore, what is unclear about the meaning of the 1926 Senate Finance Committee's report? Surely such plain language cannot be ignored on the ground that subsequent legislative history is necessary to clarify its exact meaning. Nor is the effect of the committee language avoided by labeling it an "obscure passage" as the First Circuit has done.

As a second answer to the 1926 Senate Finance Committee's report, *supra,* the opinion reasons as follows at page 183:

> (1) Congress provided that if a jeopardy assessment is made before a notice of deficiency has been issued, the Commissioner must nevertheless issue such a notice "so that the taxpayer may appeal to the Tax Court."
>
> (2) Therefore, it is "reasonable to suppose" that Congress would likewise have specifically imposed upon the Commissioner the duty to send a deficiency letter to preserve the taxpayer's right to appeal to the Tax Court if such had been the legislative intent.

In other words, the opinion says that the 1926 Senate Finance Committee's report, *supra,* providing that Section 274(d), Revenue Act of 1926, allowed waivers "but without taking away the right of the taxpayer to take the case to the Board" does not mean what it says because Congress specifically required a notice of deficiency in the case of a jeopardy assessment. Why? Because it is "reasonable to suppose" so.

The taxpayer submits that it is not necessary to rely upon "reasonable" suppositions when there is legislative history which sets forth categorically that the waiver subsection does not take away the right of a taxpayer to appeal to the Board of Tax Appeals. What Congress actually said certainly ought to carry more weight than "reasonable" suppositions based upon a separate provision dealing with an entirely different set of problems.

Finally, the opinion relies upon administrative practice, stating that the Revenue Acts subsequent to 1926 were passed by Congresses which must have been aware of the Commissioner's practice not to send deficiency notices if a waiver had been filed by the taxpayer. But the same considerations respecting that administrative practice argument advanced in *Moore v. Cleveland Ry. Co., supra,* are applicable here. Also, it is difficult to conclude that, although Congress was told in 1938 that the case law in-

validated waivers filed before a notice of deficiency, nevertheless, the legislative history sustains the notion that Congress approved an administrative practice which contravened the only reported decisions.

As a result of the foregoing material, it is submitted that *Associated Mutuals v. Delaney, supra,* is not to be preferred over *Mutual Lumber Co. v. Poe, supra.*

Randall v. Riddell

Not only does the case of *Randall v. Riddell,* S.D. Cal., decided February 7, 1952 (52-1 USTC ¶ 9207) offer nothing more than the previously examined cases, cited by the United States, but it is contrary to the decisions and opinions of the Ninth Circuit which sits above the District Court which decided the case. *Mutual Lumber Co. v. Poe, supra, and McCarthy Co. v. Commissioner, supra.*

Summary of Cases

The foregoing material reflects that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are the product of better reasoning and more accurate analysis of the statute.

IV
The Contentions of the United States

In addition to a variety of contentions based upon the notions expressed in *Moore v. Cleveland Ry. Co., supra, Roos v. U.S., supra,* and *Associated Mutuals v. Delaney, supra,* the Government has offered at least two new contentions. Turning to these first and then to the basis of its other arguments, the following is submitted.

The *Monge v. Smyth* Contention

At pages 26 through 28 of its brief, the United States reviewed the Ninth Circuit's decision in *Monge v. Smyth,* 229 F. 2d 361 (C.A. 9th, 1956), certiorari denied 351 U.S. 976, and stated at

pages 27 and 28 that "the views of the Ninth Circuit in the *Monge* case concerning the validity of a waiver appear equally applicable to the facts of the instant case, even though those views constituted 'dictum' (R. 69)." What this argument amounts to is that the Ninth Circuit, sitting en banc, should be reversed in the instant case because in an earlier case *(Monge v. Smyth, supra,)* sitting as a three judge court, it expressed contrary views in a part of its opinion which the Ninth Circuit, sitting en banc, said constituted dictum. Or to put it another way, the Government is contending that there is support for the reversal of the Ninth Circuit in this appeal because an earlier opinion in another case contains dictum which is in opposition to the views adopted by the entire Court here.

Since the meaning of *Monge v. Smyth, supra,* was fully argued in the Ninth Circuit and the Ninth Circuit has held here that the language relied upon by the United States was dictum, it would appear that a holding and opinion in the instant appeal which flatly contravenes the dictum should dispose of the matter. That is, the Ninth Circuit's decision and opinion in this case should be taken and read for what it is and says rather than for what it might have been or said had it adopted language which it held constituted dictum.

The "Unilateral Action" Argument

Throughout pages 8 and 22 of its brief, the Government argues that to sustain the Ninth Circuit would mean that a taxpayer, by "unilateral action" which he "can take at any time," could "stop the accrual of interest and yet not be bound by the waiver of restructions upon the assessment and collection of the deficiency."[15] But how can this reasoning be approved?

First of all, the Ninth Circuit did not hold here or in *Mutual Lumber Co.* and *McCarthy Co.* cases *supra,* that a taxpayer could stop the accrual of interest and yet not be bound by the waiver

[15] Brief for the United States, page 22.

of restrictions on assessment and collection. Instead it held that the waivers were premature and therefore invalid for all purposes if filed before the issuance of a notice of deficiency. By the same token, none of the cases cited by the United States so hold. Rather they hold that the waiver is valid to stop the accrual of interest even if filed before a notice of deficiency is issued. Thus, if the waiver is invalid because filed before a notice of deficiency is issued, the interest continues to run. On the other hand, if the waiver is valid whether or not a notice has been issued, the interest stops accruing.

What the United States has done here is create a "straw man" argument designed to paint the picture of a Government which can neither collect a tax nor charge interest thereon. This is simply not a correct statement of the holding of the Court below. Furthermore, even if it were, the picture is out of focus. All that the Commissioner would be required to do to avoid such a situation would be to determine the deficiency and send a notice of such deficiency before the waiver is filed. In such a case, the waiver would be valid and he could immediately assess and collect the determined deficiency.

The crux of the Commissioner's objections to the decision below will be found in the *real* reason for his insistence that he not be required to determine a deficiency and send notice of "such deficiency" before a Form 870 is deemed valid under Section 272 of the 1939 Internal Revenue Code. That reason is subdivision (f) of Section 272 which prohibits the determination of "any additional deficiency in respect of the same taxable year" if the taxpayer files a petition with the Tax Court. On the other hand, if the Commissioner can sustain the validity of a Form 870 without being required to issue a notice of deficiency, he can, for all practical purposes, avoid the prohibition of Section 272(f). This is so because the subject Form 870 states on its face that it is not a final closing agreement and does not preclude the assertion of further deficiencies. Thus, so long as the Form 870 is valid with-

out a notice of deficiency, the Commissioner can continue to assert additional tax "deficiencies" until the period of limitations has run. In short, the practice of the Commissioner insofar as Form 870's are concerned, allows him to bypass the prohibition of Section 272(f).

The Remaining Contentions

In addition to a series of statements of conclusion containing phrases such as "the manifest purpose of Section 272(d)"[16] or "we think that the language and purpose of Section 272(d) are clear",[17] the United States has offered, at page 17 of its brief, the statement that "it is a plausible inference" that the 1954 amendment to Section 272(d) was merely of a clarifying and declaratory nature and that Congress did not thereby imply that prior law required a notice of deficiency before a valid waiver could be filed. This effort to avoid the fact that Congress was aware of *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* in 1938, but did not adopt an amendment proposed to nullify those decisions, is based partially upon 1954 committee reports.[18] These reports stated that "the only material change" made in the successor to Section 272 was made in subsection (b)(3) which has nothing to do with the waiver provision. However, the two committee reports do not state what is considered a "material" change. And since the language of Section 6213(d) of the Internal Revenue Code of 1954 did add the phrase "whether or not a notice of deficiency has been issued", it is apparent that the statutory language was changed. Possibly the Congress did not consider this change to be a "material" one.

Aside from the above legislative history contention, the United States contends, at page 21 of its brief, that:

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[16] Brief for the United States, page 10.

[17] Brief for the United States, page 11.

[18] H. Rep. No. 1337, 83d Cong., 2d Sess., p. A.405 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4552); Sen. Rep. No. 1622, 83 Cong., 2d Sess., p. 573 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5222).

(1) The "unqualified" terms of Section 272(d) provide the right to waive the "restrictions" of Section 272(a) "without limitation."

(2) Section 272(a) restricts the assessment and collection of *"a* deficiency" prior to the issuance of a notice of deficiency.

(3) The taxpayer's right to insist upon this restriction is clearly a right which may be waived.

This argument is virtually the same as that found in *Associated Mutuals v. Delaney, supra,* where the opinion made a reference back to Section 272(a) for purposes of ascertaining what the term "restrictions" meant, but not to give meaning to the words "the deficiency" also found in subsection (d) of Section 272. It is a contention that treats Section 272 as primarily a waiver section rather than one which establishes the duty of the Commissioner to determine a deficiency and send a notice of such deficiency. But to classify the duty of the Commissioner to determine a deficiency and send a notice of such deficiency as a "restriction" on assessment and collection is a misreading of Section 272(a) and (d). The "restrictions" imposed upon the Commissioner are found in the third sentence of Section 272(a). And the "restrictions" which may be waived are, as is set forth in Section 272(d), "the *restrictions* provided in subsection (a) of this section *on the assessment and collection* of the whole or any part of *the deficiency.*"

If it is necessary to read Section 272(d) as if the last two words were *"a* deficiency" rather than *"the* deficiency" and to read Section 272(a) as though the duty to determine a deficiency and send a notice thereof is a "restricion" on assessment and collection, then it is submitted that there is a serious weakness in the view that a waiver is valid even though no notice of deficiency has been sent. Certainly a statute which is "clear" in its support for the Government's position should not require such a reading to justify the desired reversal of the Ninth Circuit's decision be-

low. Nor would it be necessary to read the words "at any time" as though there were no qualifying words following them.

In like fashion, the administrative practice of the Commissioner should not be necessary to support a desired reading of the subject statutory language. If administrative practice, without legislative history which clearly shows that Congress approved of such administrative practice, is an important consideration, then very little that the Commissioner does is without support. This is so because all of the actions of his agents constitute administrative practice. Somehow or another, it does not make sense, even though the administrative practice contention is much in vogue, to say that the actions or opinions of one of the litigants, if repeated enough, acquire the status of legal authority itself.

Finally, the United States, at pages 22 and 23 of its brief, suggests that *Mutual Lumber Co. v. Poe, supra,* and *McCarthy Co. v. Commissioner, supra,* are cases which are distinguishable, and that the decision below does not necessarily follow. The best answer to this argument is the answer which the Ninth Circuit gave to the government after the same contention was made below. The opinion (R. 68) said:

> "It is true that in these earlier cases the significance to be attached to a holding that the waiver was invalid was different than it is here. In Mutual and McCarthy it was to the advantage of the government to have the waivers declared invalid, while here the advantage of doing so lies in favor of the taxpayer. *But the basic question is the same in all three cases* — was the waiver valid when filed prior to the mailing of a notice of deficiency? If, as we held in Mutual and McCarthy, it was invalid and so rendered the subsequently filed notices effective in suspending the statute of limitations, it must likewise be invalid for any purpose. If invalid for any purpose, it did not relieve the commissioner from the statutory requirement of mailing a notice prior to commencing this suit." (Italics supplied)

In view of this language, what point is there in attempting to distinguish the cases now? Certainly if the very court which decided

all three cases finds that they are not distinguishable, how could a litigant expect a higher court to reverse the Ninth Circuit partially on the ground that the cases are distinguishable?

CONCLUSION

If the Court should reverse the court below and direct that judgment be entered for the United States, the taxpayer will have been denied a hearing in any court on the merits of the tax assessed. The reason is that a judgment for the sum prayed for by the United States is res judicata for that taxable year. Since the complaint below was an effort to obtain judgment for an additional tax set forth in a U. S. Treasury Form 870, the only evidence relevant in such an action is whether the additional tax was properly assessed. It is of no concern to the District Court whether the asserted additional tax is correct or not since the taxpayer has signed a Form 870. And since the asserted additional tax has not been paid, the action does not constitute a refund suit wherein the correctness of the alleged additional tax would be determined by the District Court. Thus, when a Form 870 is considered valid without a prior or subsequent issuance of a notice of deficiency, the taxpayer cannot appeal to the Tax Court. His only remedy is to pay the tax and file a refund action in a U. S. District Court or the Court of Claims. But what happens, as it did here, if the taxpayer does not have the funds to pay the additional tax during the six year period during which the Commissioner may collect the sum, and the United States files an action seeking judgment for the amount set forth in the Form 870 remaining unpaid? In such a case, the taxpayer, if the waiver is deemed valid, has judgment rendered against him without ever having had an opportunity to have a court review the correctness of the asserted additional tax. Since such a problem arises only in the case of a taxpayer who cannot pay the additional tax thereby requiring the United States to obtain a judgment, the taxpayer is in an economic condition likely to encourage the signing of a Form 870 or any other form.

Whether it is desirable that such a result be reached upon the basis of a waiver form which does not even tell the taxpayer that he is waiving his right to appeal to the Tax Court is a matter for the Court to decide. It is true that some members of the legal profession are aware that the execution of a Form 870 may result in a waiver of a right to appeal to the Tax Court, but should not the Form 870 tell the taxpayer who is not represented by counsel that he is waiving a right to appeal to the Tax Court? Also, is it good law to find that a taxpayer may waive a right before he has obtained that right?

For the reasons stated, the judgment should be sustained.

Respectfully submitted,

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